

(23,592)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 129.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*
INTERBOROUGH RAPID TRANSIT COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM SOHMER, COMPTROLLER OF THE STATE OF
NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 THE UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States to the Honorable the Justices of the Supreme Court of the State of New York in and for the Third Judicial Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, or entry of the final order on January 24, 1913, in the suit between the People of the State of New York ex rel., Interborough Rapid Transit Company, relator, and William Sohmer, as Comptroller of the State of New York, defendant, which is in the said Supreme Court of the State of New York before you, or some of you, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law or equity of the said state in which a decision in said suit could be had remitting to you or some of you the final decree or judgment of said court, wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity and against the title, right, privilege or exemption, especially set up or claimed under said Constitution, a manifest error hath happened, to the great damage of the said Interborough Rapid Transit Company, as by its complaint appears, we being willing that such error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf,

Do command you that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United

2 Washington on the 20th day of March, 1913, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, on the 20th day of February, in the year of our Lord, One thousand, nine hundred and thirteen.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Allowed by

CHARLES E. HUGHES,

*Associate Justice Supreme Court of the
United States.*

3 [Endorsed:] Supreme Court of the United States. The People of the State of New York, ex rel., Interborough Rapid Transit Co., Pl'ff in Error, against William Sohmer, as Comptroller

of the State of New York, Def't in Error. Writ of Error to the Supreme Court of the State of New York. James L. Quackenbush, Attorney for Pl'ff, No. 165 Broadway, Borough of Manhattan, New York City. Albany County, N. Y., Feb. 28, 9:40 a. m., '13. Clerk's Office.

4

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. INTERBOROUGH
RAPID TRANSIT COMPANY, Plaintiff in Error,
against

WILLIAM SOHMER, as Comptroller of the State of New York, De-
fendant in Error.

Petition for Writ of Error.

To the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States:

And now comes Interborough Rapid Transit Company, the plaintiff in error above named, by James L. Quackenbush, its attorney, and complains and alleges that in the record and also in the rendition of the judgment, or entry of the final order, on January 24, 1913, in the suit between the People of the State of New York, ex rel. Interborough Rapid Transit Company, relator, and William Sohmer as Comptroller of the State of New York, defendant, which is in the Supreme Court of the State of New York, on a remittitur from the Court of Appeals of the State of New York, being the highest court of law and equity of the said State in which a decision in said suit could be had, remitting to the said Supreme Court of the State of New York the record in said suit with an order affirming the final order theretofore entered therein in the said Supreme Court in favor of the defendant and against the relator, it was adjudged:

(1) That the two certain determinations of the Comptroller of the State of New York, each dated August 15, 1911, wherein and whereby the said Comptroller held that the plaintiff in error was properly subject to franchise taxes under the provisions of Sections 182 and 184 of the Tax Law of the State of New York, (Chapter 908 of the Laws of 1896, constituting Chapter 24 of the General Laws re-enacted by Chapter 62, Laws of 1909, being Chapter 60 of the Consolidated Laws,) with respect to its operation of the rapid transit railroad, or "subway" located in and owned by The City of New York, its capital invested in the equipment of such railroad and its earnings therefrom, for the four years ending June 30, 1907, June 30, 1908, June 30, 1909 and June 30, 1910, respectively, should, in all respects, be confirmed.

(2) That said Sections 182 and 184 of the Tax Law of the State of New York, as enacted by the Legislature in 1896 and re-enacted in 1909, in so far as they authorized the imposition of a franchise tax upon the plaintiff in error with respect to its operation of the rapid transit railroad or "subway," for the four years in question, are not in violation of the provisions of subdivision 1 of section 10

of article 1 of the Constitution of the United States, in that they do not constitute an impairment of the obligation of the contract made by the State of New York and contained in Section 35 of Chapter 4 of the Laws of 1891, known as the "Rapid Transit Act," as added by Chapter 752 of the Laws of 1894, as amended by Chapter 729 of the Laws of 1896 and Chapter 616 of the Laws of 1900, wherein the operator of any municipally owned rapid transit railroad constructed and maintained pursuant to the provisions of said "Rapid Transit Act," is exempted from all taxation "in respect to his, their or its interest under said contract (for operation) and in respect to the rolling stock and all other equipment of said road."

(3) That said Sections 182 and 184 of the Tax Law of the State of New York, as enacted by the Legislature in 1896 and re-enacted in 1909, in so far as they authorized the imposition of franchise taxes against plaintiff in error with respect to its operation of the rapid transit railroad or "subway" for the four years in question, and that the determinations of the defendant in error wherein he assumed to assess plaintiff in error for franchise taxes under the alleged authority of said sections, are not in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they do not deny to plaintiff in error the equal protection of the laws.

All of which appears in the record and proceedings in said suit, by reason whereof, manifest error hath happened, to the great damage of your petitioner.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York and the Justices thereof, to the end that the record and proceedings in said suit may be removed into the Supreme Court of the United States, and that the errors complained of by your petitioner may be examined and corrected, and that the said final order of the Supreme Court of the State of New York may be reversed, the respective determinations of the Comptroller of the State of New York reviewed, and the taxes assessed thereby against petitioner under the provisions of Sections 182 and 184 of the Tax Law may be cancelled and annulled, and that your petitioner may have such other and further relief in the premises as may be just and proper.

And your petitioner will ever pray.

Dated, New York, February 18, 1913.

INTERBOROUGH RAPID TRANSIT COMPANY,

By JAMES L. QUACKENBUSH, *Its Attorney.*

Let the writ issue.

Feb. 20, 1913.

CHARLES E. HUGHES,

*Associate Justice of the Supreme Court
of the United States.*

STATE OF NEW YORK,

County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County and also Clerk of the Supreme and County Courts, being courts of Record held therein, do hereby Certify that I have compared the annexed copy — Petition with the original thereof, filed in this office on the 28 day of Feb. 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of March, 1913.

[Seal Albany County, July, 1846.]

WM. J. GRATTAN, *Clerk.*

7 [Endorsed:] Supreme Court of the United States. The People of the State of New York ex Rel. Interborough Rapid Transit Co., Pl'ff in Error, against William Sohmer, as Comptroller of the State of New York, Def't in Error. Petition for Writ of Error to the Supreme Court of the State of New York. James L. Quackenbush, Attorney for Pl'ff, No. 165 Broadway, Borough of Manhattan, New York City.

8 Supreme Court of the United States.

26520.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. INTERBOROUGH RAPID TRANSIT COMPANY, Plaintiff in Error,
against

WILLIAM SOHMER, as Comptroller of the State of New York, Defendant in Error.

Bond.

Know all men by these presents, That we, Interborough Rapid Transit Company, a corporation duly organized under the laws of the State of New York, as Principal, and The Title Guaranty & Surety Company, a corporation duly organized under the laws of the State of Pennsylvania, as Surety, are held and firmly bound unto William Sohmer, as Comptroller of the State of New York, in the sum of Five Hundred Dollars (\$500) to be paid to the said Obligee, his successors, representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of February, 1913.

Whereas, the above named plaintiff in error is about to prosecute a writ of error in the Supreme Court of the United States, to reverse the final order entered in the above entitled proceeding by the Supreme Court of the State of New York,

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error

to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

INTERBOROUGH RAPID TRANSIT
COMPANY,

By D. W. ROSS, *Vice President.*

THE TITLE GUARANTY & SURETY
COMPANY,

By FRED. C. WILLIAMS,

Resident Vice-President.

Attest:

[SEAL.] RICHARD K. MCGONIGAL,
Resident Ass't Secretary.

I do hereby approve the foregoing bond and sureties this 20th day of February 1913.

CHARLES E. HUGHES,
Associate Justice Supreme Court of the United States.

10 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On February 18th, 1913, before me personally appeared Fred C. Williams, to me known, who being by me duly sworn, did depose and say; that he resided in the Borough of Chatham, N. J.; that he is the Resident Vice-President of The Title Guaranty & Surety Company, the corporation described in and which executed the above instrument; and he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720, of the New York Session Laws of 1893.

And the said Fred C. Williams further said, that he was acquainted with Richard K. McGonigal and knew him to be the Resident Assistant Secretary of said corporation; that the signature of said Richard K. McGonigal subscribed to the said instrument is in the genuine handwriting of said Richard K. McGonigal and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Fred C. Williams.

C. HAZEL KIRK, [SEAL.]
Notary Public, New York County.

Certificate filed in Westchester County.

At a meeting of the Executive Committee of The Title Guaranty & Surety Company, Scranton, Penna., held at the office of the Company, on the 14th day of October, A. D., 1911, the following resolution was adopted:

Resolved, that this Company do and it hereby does authorize and empower Fred C. Williams, as Resident Vice-President, attested by Geo. W. Yuengling, Resident Secretary, or Richard K. McGonigal,

Resident Assistant Secretary; or Geo. W. Yuengling, Attorney-in-fact, attested by Richard K. McGonigal, Resident Assistant Secretary, to execute, deliver and attach the seal of the Company to any and all bonds, recognizances or contracts of indemnity, and all instruments of reinsurance, and all other writings obligatory in the nature thereof, and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts and executing and guaranteeing bonds or undertakings required or permitted in all actions or proceedings or by law allowed.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

I, Richard K. McGonigal, Resident Assistant Secretary of The Title Guaranty & Surety Company have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and the seal of the Company at the City of New York on February 18th, 1913.

RICHARD K. MCGONIGAL, [SEAL.]
Resident Assistant Secretary.

The Title Guaranty & Surety Company.

Statement of Condition at the Close of Business September 30, 1912.

Resources.

Cash on Hand and in Banks.....	\$352,828.15
Real Estate	120,204.82
Mortgages	44,050.00
Other Real Estate, Mortgages and Judgments.....	61,637.45
Bonds, Market Value.....	1,247,077.50
Premiums in Course of Collection, Net.....	223,728.16
Bills Receivable and Advances on Contracts.....	189,105.09
Accrued Interest	15,770.25

\$2,254,401.42

Liabilities.

Premium Reserve	\$419,230.08
Reserve for Claims.....	279,173.88
Reserve for Taxes.....	22,577.99
Capital Stock	\$1,000,000.00
Surplus	533,419.47

Surplus as Regards Bondholders..... 1,533,419.47

\$2,254,401.42

STATE, CITY, AND COUNTY OF NEW YORK, ss:

Richard K. McGonigal, being duly sworn, says that he is the Resident Assistant Secretary of The Tit-e Guaranty & Surety Company, and that the foregoing is a correct statement of the financial condition of said Company on Sept. 30th, 1912, to the best of his knowledge and belief and that the financial condition of said Company is as favorable now as it was when such statement was made.

RICHARD K. MCGONIGAL,
Resident Assistant Secretary.

Sworn to and subscribed before me on February 18th, 1913.

[SEAL.] C. HAZEL KIRK,
Notary Public, New York County.

Certificate filed in Westchester County.

11 & 12 STATE OF NEW YORK,
County of New York, ss:

On this 18th day of February, in the year one thousand nine hundred and thirteen (1913), before me personally came D. W. Ross, to me known, who being by me duly sworn, did depose and say that he resides in New York City, New York that he is the Vice President of the Interborough Rapid Transit Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order

JOHN J. WATERS,
Notary Public, New York County, No. 174.

Certificate filed in Register's Office, New York County, No. 3116.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Bond with the original thereof, filed in this office on the 28 day of Feb. 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of March, 1913.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN, *Clerk.*

13 [Endorsed:] Supreme Court of the United States. The People of the State of New York ex Rel. Interborough Rapid Transit Co., Pl'ff in Error, against William Sohmer, as Comptroller

of the State of New York, Deft. in Error. Bond on Writ of Error to the Supreme Court of the State of New York. James L. Quackenbush, Attorney for Pl'ff, No. 165 Broadway, Borough of Manhattan, New York City.

14 UNITED STATES OF AMERICA, ss:

To William Sohmer, Esq., as Comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of New York in and for the County of Albany, wherein the People of the State of New York, ex rel., Interborough Rapid Transit Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the final order entered against the contentions of the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this — day of February, in the year of our Lord, One thousand, Nine hundred and thirteen.

CHARLES E. HUGHES,

Associate Justice of the Supreme Court of the United States.

STATE OF NEW YORK,

County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Citation with the original thereof, filed in this office on the 28 day of Feb. 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of March, 1913.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN, *Clerk.*

15 [Endorsed:] Supreme Court of the United States. The People of the State of New York ex rel., Interborough Rapid Transit Co., Pl'ff in Error, against William Sohmer, as Comptroller of the State of New York, Deft. in Error. Citation. James L. Quackenbush, Attorney for Pl'ff, No. 165 Broadway, Borough of Manhattan, New York City. Service of a copy of the within citation is admitted this 25 day of February 1913. Thomas Carmody, Attorney General of the State of New York, Attorney for defendant in Error.

16

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. INTERBOROUGH
RAPID TRANSIT COMPANY, Plaintiff in Error,
against

WILLIAM SOHMER, as Comptroller of the State of New York, De-
fendant in Error.

Assignment of Error.

Now comes Interborough Rapid Transit Company, the plaintiff in error herein, and respectfully submits that in the record, proceedings, decision and final order of the Supreme Court of the State of New York, entered on January 24, 1913, on the remittitur from the Court of Appeals of the State of New York in the above entitled proceeding, there is manifest error, to wit:

First. The Court erred in holding that Section 182 of the Tax Law of the State of New York, as enacted by Chapter 908 of the Laws of 1896, amended by Chapter 558 of the Laws of 1901, Chapter 474 of the Laws of 1906, Chapter 734 of the Laws of 1907 and re-enacted by Chapter 62 of the Laws of 1909, is not in conflict with, and in violation of the provisions of subdivision 1 of section 10 of article I of the Constitution of the United States, in that the said section, in so far as it authorized the imposition of a franchise tax against plaintiff in error for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909, and June 30, 1910, respectively, with respect to its capital invested in the equipment of the rapid transit railroad, or "subway," measured by a percentage upon such paid up capital, proportionate to the amount of dividends declared in each of the four years ending October 31, 1906, October 31, 1907, October 31, 1908, and October 31, 1909, respectively, did not

17 impair the obligations of the contract exempting from taxation the operator of any municipally owned rapid transit railroad constructed and maintained pursuant to the provisions of Chapter 4 of the Laws of 1891, made by the State of New York in 1894, and contained in Section 35 of said Chapter 4 of the Laws of 1891, as added by Chapter 752 of the Laws of 1894, and amended by Chapter 729 of the Laws of 1896 and Chapter 616 of the Laws of 1900.

Second. The Court erred in holding that Section 184 of the Tax Law of the State of New York, as enacted by Chapter 908 of the Laws of 1896, amended by Chapter 734 of the Laws of 1907 and re-enacted by Chapter 62 of the Laws of 1909, is not in conflict with, and in violation of, the provisions of subdivision 1 of section 10 of article I of the Constitution of the United States, in that the said section, in so far as it authorized the imposition of a franchise or excise tax, or license fee, against plaintiff in error for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909, and June 30, 1910, respectively, with respect to its operation of the rapid transit railroad or "subway," measured by a percentage of its re-

ceipts from such operation in each of said years, did not impair the obligations of the contract exempting from taxation the operator of any municipally owned rapid transit railroad constructed and maintained pursuant to the provisions of Chapter 4 of the Laws of 1891, made by the State of New York in 1894, and contained in Section 35 of said Chapter 4 of the Laws of 1891, as added by Chapter 752 of the Laws of 1894 and amended by Chapter 729 of the Laws of 1896 and Chapter 616 of the Laws of 1900.

Third. The Court erred in holding that Section 182 of the Tax Law of the State of New York, as enacted by Chapter 908 of the Laws of 1896, amended by Chapter 558 of the Laws of 1891, Chapter 474 of the Laws of 1906, Chapter 734 of the Laws of 1907, and re-enacted by Chapter 62 of the Laws of 1909, was not in conflict with, and in violation of, the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the said section, in so far as it authorized the imposition of a franchise tax against plaintiff in error for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909, and June 30, 1910, respectively, with respect to its capital invested in the equipment of the rapid transit railroad, or "subway" measured by a percentage upon such paid up capital proportionate to the amount of dividends declared in each of the four years ending October 31, 1906, October 31, 1907, October 31, 1908, and October 31, 1909, respectively, did not deny to plaintiff in error the equal protection of the laws.

Fourth. The Court erred in holding that Section 184 of the Tax Law of the State of New York, as enacted by Chapter 908 of the Laws of 1896, amended by Chapter 734 of the Laws of 1907 and re-enacted by Chapter 62 of the Laws of 1909, is not in conflict with, and in violation of, the provisions of section 1, of the Fourteenth Amendment to the Constitution of the United States, in that the said section, in so far as it authorized the imposition of a franchise or excise tax or license fee against plaintiff in error for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909, and June 30, 1910, respectively, with respect to its operation of the rapid transit railroad or "subway", measured by a percentage of its receipts from such operation, in each of said years, did not deny to plaintiff in error the equal protection of the laws.

Fifth. The Court erred in holding that the action of the defendant in error, as Comptroller of the State of New York, in imposing franchise taxes against the plaintiff in error for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909, and June 30, 1910, with respect to its operation of the rapid transit railroad, or "subway", its capital invested therein, and its earnings therefrom, under the alleged authority of said sections 182 and 184 of the Tax Law of the State of New York, was not in conflict with, and in violation of, the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the said action did not deny to plaintiff in error the equal protection of the laws.

Sixth. The Court erred in holding that the action of the defendant

in error, as Comptroller of the State of New York, in refusing, after due and timely application, to cancel the said franchise taxes imposed under the alleged authority of said sections 182 and 184 of the Tax Law of the State of New York, was not in conflict with, and in violation of, the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the said action did not deny to the plaintiff in error the equal protection of the laws.

Seventh. The Court erred in deciding in favor of the validity of the said Sections 182 and 184 of the Tax Law of the State of New York and the taxes imposed thereunder, and against the exemption specifically set up and claimed on behalf of the plaintiff in error.

Dated, New York, February 18th, 1913.

JAMES L. QUACKENBUSH,
Attorney for Plaintiff in Error.

RICHARD REID ROGERS,
RALPH NORTON,
Of Counsel.

STATE OF NEW YORK,
County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that I have compared the annexed copy Assignment of Error with the original thereof, filed in this office on the 28 day of Feb. 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of March, 1913.

[Seal Albany County, July, 1847.]

WM. J. GRATAN, *Clerk.*

20 [Endorsed:] Supreme Court of the United States. The People of the State of New York ex Rel. Interborough Rapid Transit Company, Plaintiff in Error, against William Sohmer, as Comptroller of the State of New York, Defendant in Error. Assignment of Error. James L. Quackenbush, Attorney for Pl'ff, No. 165 Broadway, Borough of Manhattan, New York City.

21 Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 21st Day of January, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, January 22d, 1913.

THE PEOPLE, &c., ex Rel. INTERBOROUGH RAPID TRANSIT CO.,
Appellant,
agst.

WILLIAM SOHMER, as Comptroller, &c., Respondent.

Be it remembered, That on the fifth day of December in the year of our Lord one thousand nine hundred and twelve, Interborough Rapid Transit Co.,—the appellant—in this proceeding came here into the Court of Appeals, by James L. Quackenbush, its attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And William Sohmer, as Comptroller &c. the respondent in said proceeding afterwards appeared in said Court of Appeals by Thomas Carmody his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Ralph Norton of counsel for the appellant, and by Mr. Franklin Kennedy of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to the law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, January 22nd, 1913.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

24

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of INTER-
BOROUGH RAPID TRANSIT COMPANY, Relator-Appellant,
against

WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant-Respondent.

Papers on Appeal.

James L. Quackenbush, Attorney for Relator-Appellant, 165
Broadway, Borough of Manhattan, New York City, New York.

Thomas Carmody, Attorney General, Attorney for Defendant-
Respondent, Albany, New York.

25 Supreme Court of the State of New York, Appellate Division,
Third Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of INTER-
BOROUGH RAPID TRANSIT COMPANY

against

WILLIAM SOHMER, as Comptroller of the State of New York.

Franchise Taxes, Years Ending June 30, 1907, June 30, 1908, June
30, 1909, June 30, 1910.

Statement.

This is a proceeding duly instituted in accordance with the provisions of Section 199 of the Tax Law to review two determinations of the State Comptroller, purporting to revise and readjust accounts for franchise taxes previously assessed against relator for the four years ending June 30, 1907, June 30, 1908, June 30, 1909 and June 30, 1910, in accordance with the directions of an order of the Supreme Court entered upon a decision of the Court of Appeals in "People ex rel. Interborough Rapid Transit Company vs. Williams," 200 New York, 93. The writ was issued out of the Supreme Court, Albany County on the 30th day of September, 1911, pursuant to an order allowing the same, made by Honorable Alden Chester, a Justice of the Supreme Court, duly filed and entered in the office of the Clerk of Albany County on the 30th day of September, 1911, and served on the same day as appears by the admission of service signed by E. P. Kearney, assistant deputy comptroller of the State of New York, endorsed on the original writ of certiorari herein, which endorsement is printed with the writ herein.

The return of the comptroller to the said writ was filed in the office of the Clerk of Albany County on the 11th day of November, 1911, and was served upon the attorney for the relator on the 13th day of November, 1911.

The names of the original parties in full are as above stated, and there has been no change of parties or attorneys since the beginning of this proceeding.

27

Order for Writ.

At a Special Term of the Supreme Court, Held in and for the County of Albany, at the City Hall, in the City of Albany, on the 30th day of September, 1911.

Present: Hon. Alden Chester, Justice.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY
against

WILLIAM SOHMER, as Comptroller of the State of New York.

Franchise Taxes, Years Ending June 30, 1907, June 30, 1908, June 30, 1909, June 30, 1910.

On reading and filing the petition of Interborough Rapid Transit Company, duly verified September 21, 1911, and the exhibits thereto attached, and upon the undertaking heretofore filed with the Comptroller of the State of New York, as required by law, upon the notice of this application duly served upon the Comptroller and the admission of service thereof with a copy of the petition and exhibits annexed.

Now, after hearing Ralph Norton, Esq., of counsel for the petitioner, in favor of said motion and Frank Kennedy, Esq., appearing in opposition thereto,

28 On motion of James L. Quackenbush, Esq., attorney for the petitioner, it is

Ordered, that a writ of certiorari as prayed for in said petition be issued out of and under the seal of this Court, directed to William Sohmer, Comptroller of the State of New York, to review the two separate decisions and determinations of the said Comptroller, described in the said petitions, and the questions involving the merits therein mentioned, both upon the law and the facts, which writ shall be returnable within twenty (20) days after the service thereof upon said Comptroller at the office of the Clerk of Albany County.

Enter,

ALDEN CHESTER, J. S. C.

29

Notice of Motion.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY
against

WILLIAM SOHMER, as Comptroller of the State of New York.

Franchise Taxes, Years Ending June 30, 1907, June 30, 1908, June 30, 1909, June 30, 1910.

SIR: You will please take notice that upon the petition of Interborough Rapid Transit Company, duly verified the 21st day of

September, 1911, and upon the undertaking for costs herein, filed with the Comptroller of the State of New York, copies of which are hereunto annexed, the undersigned will move this Court at a Special Term thereof to be held in and for the County of Albany, at the City Hall in the City of Albany, on the 30th day of September, 1911, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order for a writ of certiorari, and also for a writ of certiorari, to be directed to you as prayed for in said petition, and to be returnable according to law and for such other and further relief as may be just.

Dated, September 21st, 1911.

Yours, etc.,

JAMES L. QUACKENBUSH,
Attorney for Petitioner.

Office and P. O. Address, 165 Broadway, Borough of Manhattan, New York City, N. Y.

30 To William Sohmer, Esq., Comptroller of the State of New York, Albany, New York.

Admission of Service of Motion Papers by the Comptroller.

Service of a notice, of which the foregoing is a copy, with annexed copy of petition and exhibits is admitted this 21st day of September, 1911.

M. J. WALSH,
Deputy Comptroller.

Petition for Writ.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY
against

WILLIAM SOHMER, as Comptroller of the State of New York.

Franchise Taxes, Years Ending June 30, 1907, June 30, 1908, June 30, 1909, June 30, 1910.

To the Supreme Court of the State of New York:

The petition of Interborough Rapid Transit Company respectfully shows:

1. That your petitioner is a domestic corporation duly organized in May, 1902, under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and also in pursuance of the provisions of Chapter 544 of the Laws of 1902 entitled, "An act to
31 Amend Chapter 4 of the Laws of 1891 entitled 'An Act to Provide for Rapid Transit Railroads in Cities of Over One Million Inhabitants.'" Your petitioner was duly organized for the

purpose, among others, of equipping, maintaining and operating the rapid transit railroad in the boroughs of Manhattan and The Bronx, City of New York, which, at the time of petitioner's incorporation was in process of construction under a contract made between the City of New York, acting by its Board of Rapid Transit Railroad Commissioners, and John B. McDonald, dated February 21st, 1900, known as Rapid Transit Contract No. 1, and pursuant to agreements amendatory to said contract. Your petitioner further shows that the said contract and the agreements amendatory thereto were entered into between the City of New York and the said John B. McDonald, pursuant to the provisions of said Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto.

II. Upon information and belief, that from the time of the first report by petitioner herein referred to, Martin H. Glynn was the Comptroller of the State of New York and continuously occupied that office until the first day of January, 1909, when Charles H. Gaus, having been duly elected by the People of the State of New York, became Comptroller in place of said Martin H. Glynn; that said Charles H. Gaus died on or about the 31st day of October, 1909, and from that time until the 11th day of November, 1909, Otto Kelsey was the acting Comptroller of the State of New York; that on the 11th day of November, 1909, Clark Williams was appointed Comptroller of the State of New York, and from that date continuously occupied that office until the first day of January, 1911, when William Sohmer, the respondent herein, having been duly elected and qualified, became Comptroller of the State of New York; and that said William Sohmer now occupies that office.

32 III. The lease or operating part of said Rapid Transit Contract No. 1, including the provisions for the equipment of the railroad constructed thereunder, was duly assigned by the said McDonald to petitioner, with the consent of the City of New York, by written assignment on or about the 10th day of July, 1902, pursuant to and in full accordance with said Rapid Transit Act. Thereafter, petitioner proceeded to equip the road, and on October 27th, 1904, commenced to operate it and has continuously operated it as lessee since that date, pursuant to and in full accordance with the said act, said contract and said assignment.

Your petitioner also operates as lessee the rapid transit railroad in the Boroughs of Manhattan and Brooklyn, City of New York, built as an extension of the railroad constructed under said Contract No. 1, under a contract made between the City of New York, acting by its Board of Rapid Transit Railroad Commissioners, and the Rapid Transit Subway Construction Company, a domestic corporation, dated July 21st, 1902, and known as Rapid Transit Contract No. 2. Your petitioner shows that the said contract was entered into pursuant to the provisions of said Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto.

The lease or operating part of said Contract No. 2, including the provisions for the equipment of the rapid transit railroad constructed thereunder, was duly assigned by the said Rapid Transit Subway

Construction Company to petitioner, with the consent of the City of New York, by written assignment, on or about the 10th day of August, 1905, pursuant to and in full accordance with said Rapid Transit Act. Thereafter petitioner proceeded to equip the road, and since August, 1905, has continuously operated it as lessee, pursuant to and in full accordance with said act, said contract and said assignment.

33 Petitioner refers to and makes a part of this petition said Rapid Transit Contracts Nos. 1 and 2 and the several agreements amendatory to each of said contracts above referred to, the originals of which contracts and agreements are on file with the Public Service Commission for the First District of the State of New York and petitioner prays leave to present at any argument which may be had on the issues raised herein, copies of such contracts and amendatory agreements.

Since April 1st, 1903, your petitioner has also continuously operated the elevated railroads of the Manhattan Railway Company in the Boroughs of Manhattan and The Bronx, City of New York, as lessee, under the terms of a lease between Manhattan Railway Company and petitioner dated January 1st, 1903. Petitioner alleges that none of its capital is employed in the operation of the elevated railroads leased from the Manhattan Railway Company.

IV. Your petitioner alleges, upon information and belief, that in the decade from 1880 to 1890, the existing elevated and surface railroads in New York City were inadequate to accommodate the constantly increasing traveling public and that the problem of providing additional facilities was at all times in that period agitated by officers of the City of New York and State of New York. Your petitioner shows that by an act of the Legislature of the State of New York, duly passed and approved in 1891, being Chapter IV of the laws of that year, known as the Rapid Transit Act, certain individuals therein named were constituted a board of rapid transit commissioners of the City of New York, with power to adopt routes and plans of construction for rapid transit and underground railroads in said city, to secure the required consents of local authorities and property owners for the construction and operation of said railroad and to sell

34 the right to construct and operate such railroad to a corporation to be formed under the terms of such act, for such a period of time as the said board should deem advisable, and upon such terms as they should be able to exact. Your petitioner alleges, upon information and belief, that the said board did proceed, from time to time in the manner prescribed by said act, to determine that additional transit facilities in the City of New York were necessary and that such facilities could be obtained in a manner adequate to the needs of the city only by the construction of underground railroads; that said board, after having duly adopted a route and general plans of construction for such railroad and after having secured the necessary consents of the local authorities and of the General Term of the Supreme Court of the State of New York, in lieu of the consents of abutting property owners, proceeded to adopt detailed plans and specifications for the construction of the road, and

offered the franchise for sale to the highest bidder, on or about December 29th, 1892; that no responsible bidder was found willing to undertake the enterprise of constructing and operating said road. Petitioner shows that from the time of the failure to secure a bidder for the franchise along the route adopted in 1892 as above set forth, until 1894, nothing further was accomplished for the relief of congested transit conditions in New York City.

Your petitioner further shows that by an act of the Legislature of the State of New York, duly passed and approved in 1894, being Chapter 752 of the laws of that year, the Rapid Transit Act of 1891, as above referred to, was amended generally and a new board of rapid transit commissioners was created in the place of the board existing under the earlier act, having the same general powers as to the adoption of routes and plans for construction of rapid transit rail-

35 submit to the qualified electors of the City, "the question whether such railway or railways shall be constructed at the public expense." Your petitioner shows that in accordance with the directions contained in said act, the question as to whether the rapid transit railroad should be constructed at the public expense was duly submitted to the electors of said city and that such question was decided by an overwhelming majority in the affirmative; that thereafter the board proceeded to adopt certain routes and general plans of construction for the railroad, to be built with city money, and, after many delays occasioned by legal and technical obstructions, secured the necessary consents of the local authorities and of the General Term of the Supreme Court, in lieu of the consents of the abutting property owners and finally, in January, 1900, advertised its invitation to contractors for the construction and operation of a road along the route upon the plans and specifications adopted by the board; that as a result of such advertisement the contract, which was afterwards known as Rapid Transit Contract No. 1, was let to Mr. John B. McDonald, the lowest responsible bidder, upon his offer to construct the entire road for \$35,000,000.

Your petitioner shows that one of the inducements held out by the said board to secure responsible bidders for the construction and operation of the said road, was the provision contained in Sec. 35 of the Act of 1894 above referred to, wherein the interest of the operator in said railroad and the operator's investment in equipment, was exempted from taxation. Your petitioner further shows that the Act of 1894, above referred to, has been further amended and supplemented from time to time by certain acts of the Legislature of the State of New York, duly passed and approved, which acts are designated as follows:

Chapter 519 of the Laws of 1895; Chapter 729 of the Laws
36 of 1896; Chapter 616 of the Laws of 1900; Chapter 587 of the Laws of 1901; Chapters 533, 542, 544, 584 of the Laws of 1902; Chapters 562 and 564 of the Laws of 1904; Chapters 599 and 631 of the Laws of 1905; Chapters 109, 472, 606 and 607 of the Laws of 1906; Chapter 534 of the Laws of 1907; Chapter 472 of the Laws of 1908; Chapter 598 of the Laws of 1909 and Chapters 205, 504 and 506 of the Laws of 1910.

V. On or about the 24th day of August, 1907, petitioner filed in the office of the Comptroller of the State of New York a report of its gross earnings for the year ending June 30th, 1907, a true copy of which is hereto annexed, forming part of this petition, being designated "A," and being attached to, and an exhibit of the copy of the application of this company to the Comptroller of the State of New York, for a revision and readjustment of the taxes for that year, also annexed. Petitioner alleges that all the questions propounded in the form of report were fully and fairly answered, and that the said report was made at the request of the Comptroller of the State of New York.

VI. Thereafter the Comptroller of the State of New York, disregarding the protests, claims for exemption and allegations as to petitioner's freedom from liability for franchise taxes with respect to its subway operation set forth in the said report, audited and stated an account for taxes against petitioner under the provisions of Section 185 of the Tax Law, based upon earnings for the year ending June 30th, 1907, and sent notice thereof to petitioner that the amount of taxes so audited and stated for the year ending June 30, 1907, was \$285,073.33. A copy of such audited and stated account is hereto annexed, marked "Account, Year Ending June 30th, 1907."

37 Your petitioner alleges that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of the elevated lines of the Manhattan Railway Co.	\$144,916.82
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad or subway	87,656.51
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Co. dividends over 4 per cent.)	52,500.00
	<hr/>
	\$285,073.33

VII. Thereafter and on or before September 3d, 1907, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$285,073.33, at the same time protesting in writing against the assessment and the tax. A copy of the said protest is hereto annexed, being designated "B" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York, for revision and readjustment of the taxes for that year, also annexed.

VIII. That on or about the 14th day of August, 1908, and within one year from the time that the said account of the Comptroller had been audited and stated, and notice thereof sent to your petitioner, your petitioner made application in writing, duly verified to the State Comptroller to revise and readjust said account and have said account resettled. A copy of said petition is hereto annexed, marked "Application to Comptroller for Revision and Readjustment, year ending June 30th, 1907," and is made a part hereof.

IX. On or about the 14th day of August, 1908, petitioner
 38 filed in the office of the Comptroller of the State of New York a report of its gross earnings for the year ending June 30th, 1908, a true copy of which is hereto annexed, forming part of this petition, being designated "A" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for revision and readjustment of the taxes for that year, also annexed. Petitioner alleges that all of the questions propounded in the form of report were fully and fairly answered, and that the said report was made at the request of the Comptroller of the State of New York.

X. Thereafter the Comptroller of the State of New York, dis- regarding the protests, claims for exemption and allegations as to petitioner's freedom from liability for franchise taxes with respect to its subway operation, set forth in said report, audited and stated an account for taxes against petitioner, under the provisions of Section 185 of the Tax Law, based upon earnings for the year ending June 30th, 1908, and sent notice thereof to petitioner that the amount of taxes so audited and stated was \$305,294.70. A copy of such audited and stated account is hereto annexed, marked "Ac- count, year ending June 30th, 1908."

Your petitioner alleges that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of the elevated lines of the Manhat- tan Railway Co.....	\$144,958.74
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad, or sub- way	107,835.96
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Co. dividends over 4 per cent).....	52,500.00
	<hr/> \$305,294.70

39 XI. Thereafter and on or about the 20th day of August, 1908, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$305,294.70 at the same time protesting in writing against the assessment and the tax. A copy of the protest is hereto annexed, forming part of this petition, being designated "B" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for revision and readjustment of the taxes for that year, also annexed.

XII. That on or about the 25th day of August, 1908, and within one year from the time that said account of the Comptroller had been audited and stated and notice thereof sent to petitioner your petitioner made application, in writing, duly verified, to the State Comptroller to revise and readjust said account and to have said account resettled. A copy of said petition is hereto annexed, marked "Application to Comptroller for Revision and Readjustment, year ending June 30th, 1908," and is made a part hereof.

XIII. On or about the 3d day of August, 1909, petitioner filed in the office of the Comptroller of the State of New York a report of its gross earnings for the year ending June 30th, 1909, a true copy of which is hereto annexed, being designated "A," and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for revision and readjustment of the taxes for that year, also annexed. Petitioner alleges that all of the questions propounded in the report were fully and fairly answered and that the said report was made at the request of the Comptroller of the State of New York.

XIV. Thereafter the Comptroller of the State of New York, disregarding the protests, claims for exemption and allegations as to petitioner's freedom and liberty for franchise taxes with respect to its subway operation, set forth in the said report, audited and stated an account for taxes against petitioner, under the provisions of Section 185 of the Tax Law, based upon the earnings for the year ending June 30th, 1909, and sent notice thereof to petitioner that the amount of taxes so audited and stated was \$324,100.36. A copy of such audited and stated account is hereto annexed, marked "Account, year ending June 30th, 1909."

Your petitioner avers that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of the elevated lines of the Manhattan Railway Co.	\$143,530.17
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad, or subway	128,070.19
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Co. dividends over 4 per cent.) . . .	52,500.00
	<hr/>
	\$324,100.36

XV. Thereafter on or before the 2d day of September, 1909, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$324,100.36, at the same time, protesting in writing against the assessment and the tax. A copy of the protest is hereto annexed, forming a part of this petition, being designated "B" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for revision and readjustment of the taxes for that year, also annexed.

XVI. That on or about the 23d day of September, 1909, and within one year from the time that said account of the Comptroller had been audited and stated, and notice thereof sent to your petitioner, your petitioner made application in writing duly verified, to the State Comptroller to revise and readjust said account and to have said account resettled. A copy of said petition is hereto annexed, marked "Application to Comptroller for Revision and

Readjustment, year ending June 30th, 1909," and is made a part hereof.

XVII. On said several applications a hearing was granted to your petitioner by the Comptroller of the State of New York and was held at his office in the City of Albany, on the 19th day of October, 1909, at which hearing your petitioner was represented by counsel and evidence and proofs were submitted in support of said several applications. Thereafter, and on or about the 12th day of November, 1909, the Comptroller made and served upon your petitioner his determination upon said hearing and applications, wherein he refused to revise and readjust said taxes or any of them. A copy of such determination is hereto annexed and made a part hereof, marked "First Determination Upon Applications for Revision and Readjustment, Three Years ending June 30th, 1909."

Petitioner, deeming itself prejudiced and aggrieved by such determination, duly made an application to the Supreme Court of the State of New York, in and for the County of Albany, for the issuance and allowance of a writ of Certiorari to review such determination, and thereafter the proceedings necessary to obtain a judicial review of said Comptroller's determination were had, and in September, 1910, the matter was passed upon by the Court of Appeals of the State of New York. In the final order of the Supreme Court, entered upon the decision of the Court of Appeals, the determination of the Comptroller, with respect to

42 the franchise taxes assessed against the relator for the three years in question, was annulled and a new assessment was ordered. A copy of such order duly entered in the office of the Clerk of Albany County, on or about the 24th day of December, 1910, was served upon the Comptroller of the State of New York, on or about the 29th day of December, 1910. Thereafter, and on or about the 15th day of August, 1911, the Comptroller of the State of New York made a new determination with respect to the assessment for franchise taxes against petitioner for the three years ending June 30th, 1909, and sent notice thereof to petitioner on or about the 23d day of August, 1911, wherein he held:

1. That petitioner was subject to franchise taxes under the provisions of Section 182 of the Tax Law, based on business for each of the three years ending October 31st, 1906, October 31st, 1907, October 31st, 1908, with respect to its capital invested in the equipment of the rapid transit railroad or subway, measured by a percentage upon such paid-up capital in proportion to the amount of dividends declared thereon; and

2. That petitioner was also subject to franchise taxes or excise taxes or license fees for each of the three years, ending June 30th, 1907, June 30th, 1908, and June 30th, 1909, under the provisions of Section 184 of the Tax Law, with respect to its operation of the rapid transit railroad or subway, measured by a percentage of its gross earnings from such operation; and

3. That petitioner was also subject to franchise taxes for each of the three years, ending June 30th, 1907, June 30th, 1908 and June 30th, 1909, under the provisions of Section 185 of the Tax

Law, with respect to its operation of the elevated lines of the Manhattan Railway Company, measured by a percentage of its gross receipts from such operation.

43 In and by said determination the Comptroller purported to revise and readjust the taxes assessed against petitioner for the three years ending June 30, 1909, so as to make the aggregate amount due from the Interborough Rapid Transit Company for those years \$824,874.40 instead of \$914,468.39 as originally assessed. A copy of such determination is hereto annexed, marked "Second Determination, Upon Applications for Revision and Readjustment, Three Years ending June 30, 1909."

Your petitioner alleges that the aggregate amount so reaudited and restated in said second determination was made up as follows:

For taxes on capital stock based on business for the year ending October 31, 1906, on \$35,000,000 dividend 8¼%, rate 2 1-16 mills.....	\$72,187.50	
For tax on gross earnings, Elevated Division, for the year ending June 30, 1907, on \$14,491,682.36, rate 1%...	144,916.82	
For tax on gross earnings, Subway Division, for the year ending June 30, 1907, on \$8,765,650.65, at 5 mills...	43,828.25	
	<hr/>	\$260,932.57
For tax on capital stock based on business for the year ending October 31, 1907, on \$35,000,000, 9% dividend, rate 2¼ mills.....	\$78,750.00	
For tax on gross earnings for the year ending June 30, 1908, Elevated Division, on \$14,495,973.87, rate 1%...	144,958.74	
For tax on gross earnings for the year ending June 30, 1908, Subway Division, on \$10,783,596.08, rate 5 mills	53,917.98	
	<hr/>	277,626.72
For tax on capital stock based on business for the year ending October 31, 1908, on \$35,000,000, 9% dividend, rate 2¼ mills	\$78,750.00	
For tax on gross earnings for the year ending June 30, 1909, Elevated Division, on \$14,353,017.21, rate 1%...	143,530.02	
For tax on gross earnings for the year ending June 30, 1909, Subway Division, on \$12,807,018.96, rate 5 mills.	64,035.09	
	<hr/>	286,315.11
		<hr/>
		\$824,874.40

44 XVIII. On or about the 27th day of July, 1910, your petitioner filed in the office of the Comptroller of the State of New York, a report of its gross earnings for the year ending June 30th, 1910, a true copy of which is hereto annexed, forming a part of this petition, being designated "A" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for a revision and readjustment of the taxes for that year, also annexed. Your petitioner alleges that all of the questions propounded in the form of report were fully and fairly answered and that such report was made at the request of the Comptroller of the State of New York.

XIX. Thereafter, the Comptroller of the State of New York, disregarding the protests, claims for exemption and allegations as to its freedom from liability for franchise taxes with respect to its subway operation set forth in said report, audited and stated an account for taxes against petitioner under the provisions of Section 185 of the Tax Law, based upon earnings for the year ending June 30th, 1910, and sent notice thereof to petitioner that the amount of taxes so audited and stated was \$346,767.09. A copy of such audited and stated account is hereto annexed, marked "Account year ending June 30th, 1910."

Your petitioner alleges that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of elevated lines of the Manhattan Railway Company	\$151,087.14
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad, or subway	143,179.95
3 per cent. \$1,750,000 (excess of Interborough Rapid Transit Company dividend over 4 per cent.)	52,500.00
	<hr/>
	\$346,767.09

45 XX. Thereafter, and on or about the 10th day of August, 1910, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$346,767.09, at the same time protesting in writing against the assessment and the tax. A copy of such protest is hereto annexed forming part of this petition, being designated "B" and being attached to and an exhibit of the copy of the application to the Comptroller of the State of New York for a revision and readjustment of the taxes for that year, also annexed.

XXI. That on or about the 30th day of March, 1911, and within one year from the time that said account of the Comptroller had been audited and stated and notice thereof sent to petitioner, your petitioner made application in writing duly verified to the State Comptroller to revise and readjust said account and to have said account resettled. A copy of said application is hereto annexed marked "Application to Comptroller for revision and readjustment, year ending June 30th, 1910," and is made a part hereof.

XXII. Thereafter and on or about the 15th day of August, 1911, the Comptroller of the State of New York made his determination, in writing, upon said application, and sent notice thereof to petitioner on or about the 23rd day of August, 1911, wherein he held

1. That petitioner was subject to a franchise tax, based on business for the year ending Oct. 31, 1909, under the provisions of section 182 of the Tax Law, with respect to its capital invested in the equipment of the rapid transit railroad or subway, measured by a percentage upon such paid up capital in proportion to the amount of dividends declared thereon; and

46 2. That petitioner was also subject to a franchise tax, or excise tax, or license fee for the year ending June 30, 1910, under the provisions of section 184 of the Tax Law with respect to its operation of the rapid transit railroad or subway, measured by a percentage of its gross earnings from such operation; and

3. That petitioner was also subject to a franchise tax, for the year ending June 30, 1910, under the provisions of section 185 of the Tax Law, with respect to its operation of the elevated lines of the Manhattan Railway Company, measured by a percentage of its receipts from such operation.

A copy of such determination is hereto annexed and made part hereof, marked "Determination upon application for revision and readjustment, year ending June 30, 1910." In and by said determination the Comptroller purported to revise and readjust the taxes assessed against petitioner for the year ending June 30, 1910, so as to make the aggregate amount due from the company for that year \$301,427.11 instead of \$346,767.09, as originally assessed. Your petitioner alleges that said revised and readjusted account is made up as follows:

For tax on capital stock based on business for the year ending October 31, 1909, on \$35,000,000, 9% dividend, rate $2\frac{1}{4}$ mills.....	\$78,750.00
For tax on gross earnings for the year ending June 30, 1910, Elevated Division, on \$15,108,713.90, rate 1%	151,087.14
For tax on gross earnings for the year ending June 30, 1910, Subway Division, on \$15,317,994.85, rate 5 mills	71,589.97
	<hr/>
	\$301,427.11

47 XXIII. Your petitioner shows that during the year ending October 31, 1906, dividends were declared and paid upon its \$35,000,000 capital stock at the rate of $8\frac{1}{2}\%$ per annum and that for each of the years ending October 31, 1907, October 31, 1908, and October 31, 1909, respectively, dividends were paid and declared at the rate of 9% per annum, and petitioner alleges that in each of the two years ending October 31, 1906, and October 31, 1907, its net earnings from operation of the rapid *rapid* transit rail-

road, or subway, were sufficient to make the amount of dividends declared from its net earnings derived from operation of the elevated lines of the Manhattan Railway Company less than 4% upon the paid-up capital of the Interborough Rapid Transit Company, and that for each of the two years ending October 31, 1908, and October 31, 1909, the total amount of dividends declared and paid upon petitioner's paid-up capital were earnings from operation of rapid transit railroad, or subway.

XXIV. Your petitioner alleges that each and every statement of fact set forth in each and every of the reports, protests, petitions and writings presented to and filed with the Comptroller, are true, and that the copies thereof hereto annexed and made part of this petition are true copies thereof.

Your petitioner is advised and verily believes that from the evidence and proofs presented to the Comptroller, it appeared that the petitioner is subject to a franchise tax under Section 185 of the Tax Law only with respect to its operation of the elevated railroads leased from the Manhattan Railway Company and measured by a percentage of its gross earnings from such operation; that is to say:

- (1) Taxable for the year ending June 30th, 1907, only to the extent of 1 per cent. on \$14,491,682.36, which is \$144,916.82
- (2) 48 Taxable for the year ending June 30th, 1908, only to the extent of 1 per cent. upon \$14,495,873.87, which is \$144,958.74.
- (3) Taxable for the year ending June 30th, 1909, only to the extent of 1 per cent. upon \$14,353,017.21, which is \$143,530.17.
- (4) Taxable for the year ending June 30th, 1910, only to the extent of 1 per cent. upon \$15,108,713.90, which is \$151,087.14.

Your petitioner is further advised and verily believes that from the evidence and proofs submitted to the Comptroller it appeared that petitioner is not subject to a franchise tax under the provisions of Sec. 182 of the Tax Law with respect to its capital invested in the equipment of the rapid transit railroads or subway, measured by a percentage upon such paid-up capital in proportion to the amount of dividends declared, and is not subject to a franchise or excise tax, or license fee, under the provisions of Sec. 184 of the Tax Law with respect to its operation of the rapid transit railroad, or subway, measured by a percentage of its gross earnings from such operation.

XXV. Your petitioner shows that by Sec. 35 of the Rapid Transit Act, as it existed at the time each of the said contracts Nos. 1 and 2 were entered into, being Section 35 of Chapter 752 of the Laws of 1894, as amended by Chapter 729 of the Laws of 1896 and Chapter 616 of the Laws of 1900, it is provided with reference to rapid transit railroads built under and by virtue of the provisions of that act, as follows:

"Sec. 35. The equipment to be supplied by the person, firm or corporation operating any such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and
49 including all power houses and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its in-

terest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road."

That by Chapter 599 of the Laws of 1905, the said Section 35 was amended by omitting therefrom the exemption from taxation therein provided for, but the said amending act, which became a law on May 24th, 1905, contains in Section 3 the following provision:

"Nothing in this act contained shall be held to repeal, modify or alter any provision of the act hereby amended, with respect to any railroad or railroads constructed, constructing or contracted for thereunder, when this act takes effect; but the act hereby amended shall be and continue in full force and effect in respect of such railway or railways so constructed, constructing or contracted for, as if this act had not been passed."

That each of said Rapid Transit Contracts Nos. 1 and 2 contained provisions exempting the person, firm or corporation operating any railroad constructed thereunder from all taxation in language practically identical with that of Section 35 above referred to.

50 Your petitioner alleges, upon information and belief, that if the original contractor, John B. McDonald, had not assigned the right to operate the rapid transit railroad constructed under said Contract No. 1, and if said McDonald was legally competent to operate, and was now operating, such railroad he would be subject to taxation, under the laws of the State of New York, with respect to his interest under said Contract and with respect to his investment in the equipment of such railroad, only upon such real estate as he had acquired for use in connection with such railroad; that he would not be subject to franchise taxes, excise taxes, license fees or gross earnings taxes imposed under the provisions of Article IX of the Tax Law; that he would not be subject to special franchise taxes imposed under Section 43 of the Tax Law; that he would not be subject to taxes on personal property imposed under Sections 12 or 21 of the Tax Law; and that petitioner, as operator of the subway, is not subject to assessment for, or liable to pay taxes upon, any property or rights which would have been exempt if said McDonald were now operating the railroad.

Your petitioner alleges that in and by said Section 35 of the Rapid Transit Act, as above set forth, and said rapid transit contracts, Interborough Rapid Transit Company is exempt from all taxation with respect to its interests in the lease of the rapid transit railroad constructed by the City of New York under contracts with (a) John B. McDonald, and (b) Rapid Transit Subway Construction Company; that included in such interest exempted by the said Act is petitioner's right or privilege to do business in a corporate capacity, insofar as it relates to operation of the rapid transit railroad, or subway; and your petitioner further alleges its earnings from operation of said rapid transit railroad and dividends declared upon its paid-up capital invested in the equipment of such rapid transit railroad are and each of them is exempt from all taxation.

51 Your petitioner shows that in and by Section 35 of the Rapid Transit Act, and the contracts for construction and operation

above referred to, there exists a valid contract between the State of New York, the City of New York and your petitioner, wherein the first two parties agreed that the Interborough Rapid Transit Company should be exempt from all taxation with respect to its interest in the rapid transit railroad operated under such contracts, and with respect to all the equipment of such railroad as defined in said Act, and in said contracts for construction. Therefore, your petitioner alleges that the determinations of the Comptroller of the State of New York wherein he held that petitioner was subject to franchise taxes, under the provisions of Section 182 of the Tax Law, based on its business for each of the four years ending October 31, 1906, October 31, 1907, October 31, 1908, and October 31, 1909, with respect to its capital invested in the equipment of the rapid transit railroad or subway, measured by a percentage upon such paid-up capital in proportion to the amount of dividends declared, and that petitioner was also subject to franchise taxes, or excise taxes or license fees, under the provisions of Section 184 of the Tax Law, for each of the four years ending June 30, 1907, June 30, 1908, June 30, 1909 and June 30, 1910, with respect to its operation of the rapid transit railroad or subway, measured by a percentage of its gross earnings from such operation, are erroneous and illegal, for the reason that the said Sections 182 and 184 of the Tax Law, under which the Comptroller of the State of New York assumes to and has made such determinations and such assessments, in so far as they or either of them purport to authorize the imposition and collection of franchise taxes against petitioner with respect to its capital invested in or its earnings from the said rapid transit railroad, and any construction of said sections by the Comptroller and by the courts of the State of New York which authorize or make legal the imposition and collection of such taxes, impair the obligations of the said contract between your petitioner, the State of New York and the City of New York, in violation of Sub-division 1 of Section 10, of Article 1, of the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts, and in violation of that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides that no state shall deny to any person within its jurisdiction the equal protection of the law.

XXVI. Your petitioner shows that the rapid transit railroad in the City of New York, constructed under the two contracts above mentioned, is the property of the City of New York, a municipal corporation of the State of New York, held for a public use, and that the only interest of petitioner therein is that of lessee for a term of years.

That by sub-division 3 of Section 4 of the Tax Law of the State of New York, the property of a municipal corporation held for a public use, except such portion as is not within the municipal corporation, is exempt from all taxation, and your petitioner alleges that by taking an assignment of the lease or operating part of each of said rapid transit contracts Nos. 1 and 2, petitioner became party to a contract between it and the State of New York, wherein the state agreed that petitioner should be exempt from all taxation with respect to its occupation and use of such municipal property.

That by said Section 35 of the Rapid Transit Act, above referred to, all of the equipment supplied by the operator of the rapid transit railroad to be constructed under such Act is specifically exempted from taxation; that all of petitioner's paid-up capital is invested in the equipment of the rapid transit railroad constructed under the two contracts above referred to, and that such capital is thereby exempted from all taxation; that petitioner's exemption from taxation as to such equipment and its capital invested therein is created and assured to it by the contract existing between it, the State of New York and the City of New York, referred to and more fully set forth in Paragraph XXV of this petition.

Your petitioner further shows that the taxes assessed against Interborough Rapid Transit Company by the two determinations of the Comptroller of the State of New York, herein referred to, for the four years ending June 30, 1910, as a percentage upon the total paid-up capital of petitioner proportionate to the amount of dividends declared, and as a percentage upon the gross earnings received by petitioner from the operation of the said rapid transit railroad, are in effect taxes upon petitioner's capital invested in property exempted by law from taxation, and are in part taxes upon income from property, owned by a municipal corporation of the State of New York, and are taxes upon that property itself. Therefore, your petitioner alleges that the taxes so assessed to petitioner by said determinations, and measured by a percentage of its paid-up capital proportionate to dividends declared, and measured by a percentage upon its earnings from the rapid transit railroad, are illegal in that they have been assessed upon property exempt by law from taxation, and that Sections 182 and 184 of the Tax Law under which the Comptroller assumes to and has made such determinations and such assessments in so far as they or either of them purport to authorize the imposition and collection of franchise taxes against petitioner

with respect to its capital invested in or its earnings from said rapid transit railroad, and any construction of said sections by the State Comptroller and by the Courts of the State of New York, which authorize or make legal the imposition and collection of such taxes, impair the obligation of the said contracts between your petitioner, the State of New York and the City of New York, in violation of sub-division 1 of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and in violation of that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

XXVII. Your petitioner shows and concedes that it is properly subject to an annual franchise tax for the four years, ending June 30, 1910, with respect to its operation of the elevated railroads of the Manhattan Railway Company under the provisions of Section 185 of the Tax Law.

Your petitioner further shows that in and by Section 183 of the Tax Law it is provided that corporations owning or operating elevated railroads, and liable to a tax under Section 185 of the Tax Law,

shall be exempt from the payment of taxes prescribed by Section 182 of the Tax Law.

Therefore your petitioner alleges that the two determinations of the Comptroller of the State of New York, in so far as they purport to assess a franchise tax against petitioner under the provisions of Section 182 of the Tax Law, measured by a percentage upon its paid up capital proportionate to dividends declared, are and each of them is illegal and void.

XXVIII. Your petitioner alleges that the said assessments and said determinations of the amounts which petitioner was
55 liable to pay under the provisions of Article "IX" of the Tax Law, are illegal, and erroneous in the following amounts:

Taxes on capital stock based on business for the year ending October 31, 1906, \$72,187.50.

Tax on gross earnings, Subway Division, for the year ending June 30, 1907, \$43,828.25.

Tax on capital stock based on business for the year ending October 31, 1907, \$78,750.

Tax on gross earnings for the year ending June 30, 1908, Subway Division, \$53,917.98.

Tax on capital stock based on business for the year ending October 31, 1908, \$78,750.

Tax on gross earnings for the year ending June 30, 1909, Subway Division, \$64,035.09.

Tax on capital stock based on business for the year ending October 31, 1909, \$78,750.

Tax on gross earnings for the year ending June 30, 1910, Subway Division, \$71,589.17.

XXIX. Your petitioner, pursuant to the statute in such case made and provided, has duly deposited with the Treasurer of the State of New York the several sums set forth in the separate accounts audited and stated by the Comptroller of the State of New York, being the full amount of the taxes, percentages and interest and other charges stated in each of said accounts and your petitioner has duly filed an undertaking with the State Comptroller in an amount and with sureties approved by a Justice of the Supreme Court of the State of New York, to the effect that if the writ of certiorari herein prayed for be dismissed and the determinations reviewed, be confirmed, this petitioner will pay any and all charges and costs which may accrue against it in the prosecution of the writ, including the cost of all appeals. A copy of such undertaking is hereto annexed, marked "Undertaking" and made a part hereof.

XXX. Your petitioner shows that it is aggrieved by the
56 said determinations of the Comptroller, and will be injured thereby. That no previous application for the writ herein asked for or for any similar writ to review the determinations herein complained of, has been made to any Court or Judge.

Wherefore, your petitioner, desiring to review, both on the law and on the facts, the second determination of the Comptroller, upon the applications heretofore made to him by your petitioner for revision and readjustment of the accounts audited and stated by the Comptroller for franchise taxes against petitioner for the year end-

ing June 30, 1907, June 30, 1908, and June 30, 1909, and the determination of the Comptroller upon the application heretofore made to him by your petitioner for a revision and readjustment of the account audited and stated by the Comptroller for franchise taxes against petitioner for the year ending June 30, 1910, as hereinbefore set forth, prays that a writ of certiorari may issue out of this Court, directed to William Sohmer, Comptroller of the State of New York, commanding him to certify and return to this Court, at the office of the Clerk of Albany County, all and singular the evidence before him upon such applications, and all the papers and proofs submitted, and all proceedings had therein, and all his decisions and actions in the premises, with all other evidence, documents, reports, records and papers relating thereto in his possession, or under his control submitted to or considered by him, concerning said accounts, together with a statement of the grounds or basis of his determination, to the end that the said determinations and decision may be reviewed by this Honorable Court, and that the said original and re-settled accounts may be corrected and re-stated, and that your petitioner may have such other and further relief in the premises as may be just and proper.

And your petitioner will ever pray.

Dated, New York, September 21st, 1911.

INTERBOROUGH RAPID TRANSIT
COMPANY,
By J. H. CAMPBELL, *Treasurer*.

JAMES L. QUACKENBUSH,
Attorney for Petitioner.

165 Broadway, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

J. H. Campbell, being duly sworn, deposes and says: That he is the Treasurer of the Interborough Rapid Transit Company, the petitioner herein. That he has read the foregoing petition and knows the contents thereof, that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

J. H. CAMPBELL.

Sworn to before me this 21st day of September, 1911.

[SEAL.]

RALPH NORTON,
Notary Public, Queens County.

Certificate filed in New York County.

- 58 *Application to Comptroller for Revision and Readjustment,
Year Ending June 30, 1907.—Attached as an Exhibit to
Foregoing Petition.*

In the Matter of the Application of INTERBOROUGH RAPID TRANSIT COMPANY for a Revision and Readjustment of the Amount Heretofore Audited and Stated by the Comptroller for Taxes, under Section 185 of the Tax Law.

To Hon. Martin H. Glynn, Comptroller of the State of New York:

The petition of Interborough Rapid Transit Company respectfully shows and alleges that:

I.

Your petitioner is a domestic corporation duly organized in May, 1902, under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law, and the acts amendatory thereof and supplementary thereto, and pursuant to the provisions of Chapter 544 of the Laws of 1902, being an act entitled, "An Act to amend Chapter 4 of the Laws of 1891, entitled, 'An Act to provide for Rapid Transit Railroads in cities of over one million inhabitants.'"

Your petitioner was duly organized for the purpose, among others, of equipping, maintaining and operating the rapid transit railroad in the Boroughs of Manhattan and The Bronx, which, at the time of petitioner's incorporation, was in process of construction under a contract made between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and John B. McDonald, dated February 21, 1900, pursuant to the provisions of the said Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplementary thereto, and pursuant to agreements amendatory to said contract.

II.

Since October 27, 1904, petitioner has continuously operated said rapid transit railroad, the lease or operating part of said contract between McDonald and the City of New York, including the provisions for equipment of the road, having been duly assigned to petitioner pursuant to and in full accordance with said rapid transit act.

Since April 1, 1903, petitioner has also continuously operated the elevated railroad system of the Manhattan Railway Company, in the City of New York, as lessee under lease between petitioner and the Manhattan Railway Company, dated January 1, 1903.

III.

On or about August 24, 1907, petitioner filed in the office of the Comptroller of the State of New York a report of gross earnings, a copy of which is hereto annexed forming part of this petition, marked "A." Petitioner avers that all of the facts stated in each of

said reports are true and that each of said reports was made at the request of the Comptroller of the State of New York.

Thereafter, the Comptroller of the State of New York, disregarding the protests and claims for exemption set forth in said reports audited and stated an account for taxes to be paid by petitioner and sent notices thereof to petitioner that the amount of taxes so audited and stated was \$285,073.33.

Your petitioner avers that the amount so stated was made up as follows:

1 per cent. upon the Gross Earnings of the Manhattan Railway Division	\$144,916.82
1 per cent. upon the Gross Earnings of the Subway Division	87,656.51
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Co. dividends over 4 per cent.)	52,500.00
	<hr/>
	\$285,073.33

V.

Thereafter, and on or before August 31, 1907, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$285,073.33, at the same time protesting in writing against the assessment and deposit. A copy of the protest in writing is hereto annexed forming part of this petition, marked "B." Petitioner avers that all of the statements contained in said written protest are true.

VI.

Petitioner avers, and respectfully insists, that the tax and assessment above set forth were illegal and erroneous and that the said tax was not and cannot be legally demanded for the reasons, among others, set forth in said reports filed with the Comptroller, and the said written protest made and filed at the time of the deposit of the amount of the tax.

Wherefore, petitioner, Interborough Rapid Transit Company, makes this application and prays that the said account so audited and stated be revised and readjusted, and that the said account be resettled by striking therefrom and by crediting to the account of said company the sum of \$140,156.51, and that the petitioner have such other and further relief as may be proper.

INTERBOROUGH RAPID TRANSIT CO.,
By FRANK HEDLEY,
Vice-President and General Manager.

ALFRED A. GARDNER,
Attorney, Office and P. O. Address,
115 Broadway, New York City.

STATE OF NEW YORK,
County of New York, ss:

Frank Hedley, being duly sworn, deposes and says: That he is Vice-President and General Manager of Interborough Rapid Transit Company, petitioner herein; that he has read the foregoing petition, and that the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FRANK HEDLEY.

Sworn to before me this 13th day of August, 1908.

J. TUFTON MASON,
Commissioner of Deeds, New York City.

62 Report of Relator to Comptroller, Year Ending June 30, 1907, Attached as an Exhibit to Foregoing Petition.

"A."

Franchise Tax on Elevated Railroads or Surface Railroads Not Operated by Steam.

(Return this to Comptroller.)

Report of the Gross Earnings in the State of New York of the Interborough Rapid Transit Company for the Year Ending June 30, 1907, Made in Accordance with the Requirements of Chapter 908, Laws of 1896, Section 185.

Office of the Interborough Rapid Transit Company (Please Give P. O. Address with No. and Street), No. 21 Park Row, New York.

NEW YORK, August 24th, 1907.

1. Organized under the laws of the State of New York.
2. Date of organization of the Company, May 6th, 1902.
3. Total authorized Capital of Company..... \$35,000,000.00
4. Whole number of shares of stock authorized.. 350,000.00
5. Number of shares of stock issued..... 350,000.00
6. Par value of each share..... \$100.00
7. Amount paid into the Treasury of the Company on each share 100.00
8. Amount of Capital paid in..... 35,000,000.00
9. Amount of Capital upon which dividends were declared 35,000,000.00
10. Date of each dividend declared:

Oct. 1, 1906.....	\$787,500
Jan. 1, 1907.....	787,500

63

11. Amount of each dividend declared:

Apr. 1, 1907.....	\$787,500	
July 1, 1907.....	787,500	
	<hr/>	3,150,000.00

12. Rate per cent per annum of dividends..... 9 per cent.

13. Gross Earnings derived from all sources during
the above mentioned period..... \$14,491,682.36(Manhattan Ry. Div.; as to Rapid Transit Underground Road,
see below.)

This report includes the gross earnings received from lines of the Manhattan Railway Co. leased by Interborough Rapid Transit Company and for which said company is liable to the state for the tax on gross earnings.

Names of companies leased: Manhattan Railway Company.

By provisions of Section 35, Chapter 4, of the Laws of 1891, as amended by the Laws of 1894, Chapter 752, Section 9, and Chapter 729, Section 4, of the Laws of 1896, the Interborough Rapid Transit Company is exempt from all taxation in respect to its interest in the lease of the Rapid Transit Railroad, constructed by the City of New York, under contract with John B. McDonald, dated February 21st, 1900, and this company alleges and insists that the earnings from operation of the said Rapid Transit Railroad are exempt and not taxable under Chapter 908, Laws of 1896, Section 185, or under any other provision of law.

This company further alleges that the said Rapid Transit Railroad was constructed and is operated under and by virtue of the said Chapter 4 of the Laws of 1891, known as the Rapid Transit act, and the acts amendatory thereof and supplemental thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax Law.

64 Interborough Rapid Transit Company protests that the gross earnings from operation of said Rapid Transit Railroad are not taxable and that the company is not required by law to make a statement of its gross earnings from such operation. Under protest, therefore, the company states that the gross earnings derived from the operation of the said Rapid Transit Railroad for the year ending June 30th, 1907, were \$8,765,650.65.

This company also alleges that of the dividends above set forth amounting to \$3,150,000 the sum of \$2,283,111.74 were net earnings of said Rapid Transit Railroad constructed by virtue of Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplemental thereto, and were net earnings from the operation thereof which this company protests and insists are not subject to taxation under Chapter 908, Laws of 1896, Section 185, or under any other provision of law. Deducting said net earnings from said Rapid Transit Railroad, amounting to \$2,283,111.74 from \$3,150,000, the whole amount paid in dividends, there remains \$866,888.26, which

said \$866,888.26 is less than 4 per cent. upon the amount of paid-up capital employed by said Interborough Rapid Transit Company.

(Signed)

D. W. McWILLIAMS, *Treasurer*.

65 STATE OF NEW YORK,
County of New York, as:

On this 24th day of August, A. D. 1907, personally appeared before me, a Notary Public in and for the County of New York, Daniel W. McWilliams, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, stock, scrip or of any other character or description, declared by said company during the year ending on the first day of July, A. D., 1907.

(Signed)

D. W. McWILLIAMS, *Treasurer*.

Sworn and subscribed before me the day and year aforesaid.

(Signed)

JAS. F. SMITH,

Notary Public, No. 284, New York City.

66 *Letter of Protest from D. W. McWilliams to Comptroller,
Dated August 31, 1907, Attached as an Exhibit to Fore-
going Petition.*

"B."

Interborough Rapid Transit Company,
13-21 Park Row.

D. W. McWilliams, *Treasurer*.

NEW YORK, August 31st, 1907.

Hon. Martin H. Glynn, Comptroller of the State of New York,
Albany, N. Y.

DEAR SIR: Acting for the Interborough Rapid Transit Company, and under protest on its behalf, I herewith inclose a check for \$285,073.33, being the amount stated by you, and demanded as an account for taxes on gross earnings and excess dividends claimed by you to be due under Section 185 of the Tax Law from Interborough Rapid Transit Company for the year ending June 30th, 1907.

This company protests and alleges that it is taxable under Section 185 of the Tax Law only upon the gross earnings of the elevated railroads leased from the Manhattan Railway Company; that is to say, taxable only to the extent of 1 per cent. on \$14,491,682.36, which is \$144,916.82, and that the further sum of \$140,156.51 has been added to and included in the statement of account by you without any authority of law.

67 By the provisions of Section 35, Chapter 4, of the Laws of 1891, as amended by the Laws of 1894, Chapter 752, Section 9, and Chapter 729, Section 4, of the Laws of

1896, the Interborough Rapid Transit Company is exempt from all taxation in respect to its interest in the lease of the Rapid Transit Railroad, constructed by the City of New York, under contract with John B. McDonald, dated February 21st, 1900, and this company alleges and insists that the earnings from operation of the said Rapid Transit Railroad are exempt and not taxable under Chapter 908, Laws of 1896, Section 185, or under any other provision of law.

This company further alleges that the said Rapid Transit Railroad was constructed and is operated under and by virtue of the said Chapter 4 of the Laws of 1891, known as the Rapid Transit Act, and the acts amendatory thereof and supplemental thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax law. Interborough Rapid Transit Company protests that the gross earnings from operation of the said Rapid Transit Railroad are not taxable under Section 185 of the Tax Law, or any other provision of law.

This company further protests and alleges that the full amount of dividends paid by it during the year ending on the 30th day of June, 1907, was \$3,150,000, and of that sum \$2,283,111.74 were net earnings of said Rapid Transit Railroad constructed by virtue of Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplemental thereto, and were net earnings from the operation thereof which this company protests and insists are not subject to taxation under Chapter 908, Laws of 1896, Section 185, or under any other provisions of law. Deducting said net earnings from said Rapid Transit Railroad, amounting to \$2,283,111.74 from \$3,150,000, the whole amount paid in dividends, there remains \$866,888.26, which said \$866,888.26 is less than 4 per cent. upon the amount of paid-up capital employed by said Interborough Rapid Transit Company.

68 Interborough Rapid Transit Company, therefore, in depositing the full amount stated in the account, to wit, \$285,073.33, reiterates that the sum of \$140,156.51 has been included by you in the aforesaid statement of account for taxes without any authority of law, and said sum is herewith deposited with you under protest for the reasons above set forth, and heretofore set forth more fully in the report by this company, duly verified August 24th, 1907, and filed in your office on August 26th, 1907.

Very respectfully yours,

D. W. McWILLIAMS, *Treasurer.*

Account Year Ending June 30, 1907, Attached as an Exhibit to Foregoing Petition.

Comptroller's Office, Albany, N. Y.

The Interborough Rapid Transit Co., Daniel W. McWilliams, 21 Park Row, N. Y. C., in account with the State of New York, Dr.

For Tax on Franchise or Business, based on Gross Earnings, per Chap. 908, Laws of 1896, and the Acts amendatory thereof, for year ending June 30, 1907, as per report filed. Gross Earnings, \$23,257,333.01.

Tax at rate of one per cent.....	\$232,573.33
Excess Dividend Tax	52,500.00

\$285,073.33

(Return this bill to the Comptroller with draft or check payable to State Treasurer.)

69 The tax specified is due and payable August 1st. Interest attaches after that date.

State of New York, Treasurer's Office.

\$285,073.33/100.

ALBANY, Sept. 3, 1907.

Received from the above-named Company Two hundred and eighty-five thousand and seventy-three 33/100 Dollars, in full for above tax on Franchise or Business based on Gross Earnings.

G. W. BATTEN,
Deputy Treasurer.

J. A. WENDELL,
Ass't Second Deputy Comptroller.

70 *Application to Comptroller for Revision and Readjustment Year Ending June 30, 1908, Attached as an Exhibit to Foregoing Petition.*

In the Matter of the Application of INTERBOROUGH RAPID TRANSIT COMPANY for a Revision and Readjustment of the Amount Herebefore Audited and Stated by the Comptroller for Taxes under Section 185 of the Tax Law.

To Hon. Martin H. Glynn, Comptroller of the State of New York:
The petition of Interborough Rapid Transit Company respectfully shows and alleges that:

I.

Your petitioner is a domestic corporation duly organized in May, 1902, under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law, and the acts amendatory thereof and supplementary thereto, and pursuant to the provisions of Chapter 544 of the Laws of 1902, being an act entitled, "An Act to Amend Chapter 4 of the Laws of 1891, entitled, 'An Act to provide for Rapid Transit Railroads in cities of over one million inhabitants.'"

Your petitioner was duly organized for the purpose, among
71 others, of equipping, maintaining and operating the rapid transit railroad in the Boroughs of Manhattan and The Bronx, which, at the time of petitioner's incorporation, was in process of construction under a contract made between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners) and John B. McDonald, dated February 21, 1900, pursuant to the provisions of the said Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplementary thereto, and pursuant to agreements amendatory to said contract.

II.

Since October 27, 1904, petitioner has continuously operated said rapid transit railroad, the lease or operating part of said contract between McDonald and the City of New York, including the provisions for equipment of the road, having been duly assigned to petitioner pursuant to and in full accordance with said rapid transit act.

Since July 10th, 1905, petitioner has also continuously operated, between Ann street and South Ferry, and since May 10th, 1908, between Ann street and Flatbush avenue, the Rapid Transit Railroad constructed, pursuant to Chapter 4 of the Laws of 1891 and acts amendatory thereof and supplementary thereto, and pursuant to a contract between the City of New York and the Rapid Transit Subway Construction Company, dated July 21st, 1902, the lease or operating part of said contract, including the provisions for equipment of the road, having been duly assigned to petitioner pursuant to and in full accordance with said rapid transit act.

Since April 1, 1903, petitioner has also continuously operated the elevated railroad system of the Manhattan Railway Company, in
72 the City of New York, as lessee under lease between petitioner and the Manhattan Railway Company, dated January 1, 1903.

III.

On or about August 1, 1908, petitioner filed in the office of the Comptroller of the State of New York a report of gross earnings, a copy of which is hereto annexed forming part of this petition, marked "A." Petitioner avers that all of the facts stated in said report are true and that said report was made at the request of the Comptroller of the State of New York.

IV.

Thereafter, the Comptroller of the State of New York, disregarding the protests and claims for exemption set forth in said report audited and stated an account for taxes to be paid by petitioner and sent notices thereof to petitioner that the amount of taxes so audited and stated was \$305,294.70.

Your petitioner avers that the amount so stated was made up as follows:

1 per cent. upon the Gross Earnings of the Manhattan Railway Division	\$144,958.74
1 per cent. upon the Gross Earnings of the Subway Division	107,835.96
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Co. dividends over 4 per cent.)	52,500.00
	<hr/>
	\$305,294.70

V.

Thereafter, and on or before August 19, 1908, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$305,294.70, at the same time protesting in writing against the assessment and deposit. A copy of the protest in writing is hereto annexed forming part of this petition, marked "B." Petitioner avers that all of the statements contained in said written protest are true.

VI.

Petitioner avers, and respectfully insists, that the tax and assessment above set forth were illegal and erroneous and that the said tax was not and cannot be legally demanded for the reasons, among others, set forth in said reports filed with the Comptroller and the said written protest made and filed at the time of the deposit of the amount of the tax.

Wherefore, petitioner, Interborough Rapid Transit Company, makes this application and prays that the said account so audited and stated be revised and readjusted, and that the said account be resettled by striking therefrom and by crediting to the account of said company the sum of \$160,335.96, and that the petitioner have such other and further relief as may be proper.

INTERBOROUGH RAPID TRANSIT CO.,
By FRANK HEDLEY,
Vice-President and General Manager.

ALFRED A. GARDNER, *Attorney.*

Office and P. O. Address, 115 Broadway, N. Y. County.

74 STATE OF NEW YORK,
County of New York, ss:

Frank Hedley, being duly sworn, deposes and says: That he is vice-president and general manager of Interborough Rapid Transit Company, petitioner herein; that he has read the foregoing petition, and that the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FRANK HEDLEY.

Sworn to before me this 24th day of August, 1908.

EMIL PENSEL,
Notary Public, N. Y. County.

75 Report of Relator to Comptroller Year Ending June 30, 1908,
Attached as an Exhibit to Foregoing Petition.

"A."

Franchise Tax on Elevated Railroads or Surface Railroads Not
Operated by Steam.

(Return this to Comptroller.)

Report of the Gross Earnings in the State of New York of the
Interborough Rapid Transit Company for the year ending June
30, 1908, made in accordance with the requirements of Chapter
908, Laws of 1896, Section 185.

Office of the Interborough Rapid Transit Company, No. 21 Park
Row, New York.

NEW YORK, August 13, 1908.

1. Organized under the laws of the State of New York.
2. Date of organization of the Company, May 6th, 1902.
3. Total authorized Capital of Company..... \$35,000,000.00
4. Whole number of shares of stock authorized.. 350,000.00
5. Number of shares of stock issued..... 350,000.00
6. Par value of each share..... \$100.00
7. Amount paid into the Treasury of the Com-
pany on each share..... 100.00
8. Amount of Capital paid in..... 35,000,000.00
9. Amount of Capital upon which dividends were
declared 35,000,000.00
10. Date of each dividend declared Oct. 1, 1907,
\$787,500; Jan. 1, 1908, \$787,500; Apr. 1,
1908, \$787,500; July 1, 1908, \$787,500....
11. Amount of each Dividend declared..... 3,150,000.00

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12. Rate per cent. per annum of dividends..... 9 per cent.
 13. Gross Earnings, derived from all sources during
 the above period..... \$14,495,873.87

(Manhattan Ry. div., as to Rapid Transit Underground Road, see below.)

This report includes the gross earnings received from lines of the Manhattan Railway Co., leased by Interborough Rapid Transit Company, and for which said company is liable to the State for the tax on gross earnings.

Names of companies leased: Manhattan Railway Company.

By the provisions of Section 35, Chapter 4, of the Laws of 1891, as amended by the Laws of 1894, Chapter 752, Section 9, and Chapter 729, Section 4, of the Laws of 1896, the Interborough Rapid Transit Company is exempt from all taxation in respect to its interest in the lease of the Rapid Transit Railroad, constructed by the City of New York, under contract with John B. McDonald, dated February 21st, 1900, and this company alleges and insists that the earnings from operation of the said Rapid Transit Railroad are exempt and not taxable under Chapter 908, Laws of 1896, Section 185, or under any other provision of law.

This company further alleges that the said Rapid Transit Railroad was constructed and is operated under and by virtue of the said Chapter 4 of the Laws of 1891, known as the Rapid Transit Act, and the acts amendatory thereof and supplemental thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax Law. Interborough Rapid Transit Company protests that the gross earnings from operation of the said Rapid Transit Railroad are not taxable and that the company is not required by law to make a statement of its gross earnings from such operation. Under protest, therefore, the company states that the gross earnings derived from the operation of the said Rapid Transit Railroad for the year ending June 30th, 1908, were \$10,783,596.08.

This company also alleges that of the dividends above set forth amounting to \$3,150,000 the sum of \$3,050,772.74 were net earnings of said Rapid Transit Railroad constructed by virtue of Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplemental thereto, and were net earnings from the operation thereof which this company protests and insists are not subject to taxation under Chapter 908, Laws of 1896, Section 185, or under any other provision of law. Deducting said net earnings from said Rapid Transit Railroad, amounting to \$3,050,772.74, from \$3,150,000, the whole amount paid in dividends, there remains \$99,227.26, which said \$99,227.26 is less than 4 per cent. upon the amount of paid-up capital employed by said Interborough Rapid Transit Company.

(Signed)

DANIEL W. McWILLIAMS, *Treasurer.*

78 STATE OF NEW YORK,
County of New York, ss:

On this 13th day of August, A. D., 1908, personally appeared before me, a Notary Public in and for the County of New York, Daniel W. McWilliams, treasurer of the above-named company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, stock, script or of any other character or description, declared by said company during the year ending on the first day of July, A. D., 1908.

(Signed) DANIEL W. McWILLIAMS, *Treasurer*.

Sworn to and subscribed before me the day and year aforesaid.

(Signed) JOHN M. BURNET,
[SEAL.] *Notary Public, New York County, N. Y.*

79 *Letter of Protest from D. W. McWilliams to Comptroller
Dated August 18, 1908, Attached as an Exhibit to Fore-
going Petition.*

"B."

Interborough Rapid Transit Company.

August 18, 1908.

Hon. Martin H. Glynn, Comptroller of the State of New York,
Albany, N. Y.

DEAR SIR: Acting for the Interborough Rapid Transit Company, and under protest on its behalf, I herewith enclose a check for \$305,294.70, being the amount stated by you, and demanded as an account for taxes on gross earnings and excess dividends claimed by you to be due under Section 185 of the Tax Law from Interborough Rapid Transit Company for the year ending June 30th, 1908.

This company protests and alleges that it is taxable under Section 185 of the Tax Law only upon the gross earnings of the elevated railroads leased from the Manhattan Railway Company; that is to say, taxable only to the extent of 1 per cent. on \$14,495,873.87, which is \$144,958.74, and that the further sum of \$160,335.96 has been added to and included in the statement of account by you without any authority of law.

By the provisions of Section 35, Chapter 4, of the Laws of 1891, as amended by the Laws of 1894, Chapter 752, Section 9, and Chapter 729, Section 4, of the Laws of 1896, the Interborough
80 Rapid Transit Company is exempt from all taxation in respect to its interest in the lease of the Rapid Transit Railroad, constructed by the City of New York, under contract with John B. McDonald, dated February 21st, 1900, and this company alleges and insists that the earnings from operation of the said Rapid

Transit Railroad are exempt and not taxable under Chapter 908, Laws of 1896, Section 185, or under any other provision of law.

This company further alleges that the said Rapid Transit Railroad was constructed and is operated under and by virtue of the said Chapter 4 of the Laws of 1891, known as the Rapid Transit Act, and the acts amendatory thereof and supplemental thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax Law. Interborough Rapid Transit Company protests that the gross earnings from operation of the said Rapid Transit Railroad are not taxable under Section 185 of the Tax Law, or any other provision of law.

This company further protests and alleges that the full amount of dividends paid by it during the year ending on the 30th day of June, 1908, was \$3,150,000, and of that sum \$3,050,772.74 were net earnings of said Rapid Transit Railroad constructed by virtue of Chapter 4 of the Laws of 1891, and the acts amendatory thereof and supplemental thereto, and were net earnings from the operation thereof which this company protests and insists are not subject to taxation under Chapter 908, Laws of 1896, Section 185, or under any other provision of law. Deducting said net earnings from said Rapid Transit Railroad, amounting to \$3,050,772.74 from \$3,150,000, the whole amount paid in dividends, there remains \$99,227.26, which said \$99,227.26 is less than 4 per cent. upon the amount of paid-up capital employed by said Interborough Rapid Transit Company.

81 Interborough Rapid Transit Company, therefore, in depositing the full amount stated in the account, to wit, \$305,294.70, reiterates that the sum of \$160,335.96 has been included by you in the aforesaid statement of account for taxes without any authority of law, and said sum is herewith deposited with you under protest for the reasons above set forth, and heretofore set forth more fully in the report by this company, duly verified August 13th, 1908, and filed in your office on August 14th, 1908.

Very respectfully yours,

DANIEL W. McWILLIAMS, *Treasurer.*

82 *Account Year Ending June 30, 1908, Attached as on Exhibit to Foregoing Petition.*

Comptroller's Office, Albany, N. Y.

The Interborough Rapid Transit Co., D. W. McWilliams, 21 Park Row, N. Y. C., in Account with the State of New York, ———, Dr.

For tax on Franchise or Business, based on gross earnings, per Chap. 908, Laws of 1896, and the Acts amendatory thereof, for year ending June 30, 1908, as per report filed. Gross earnings, \$25,279,469.95.

Tax at rate of one per cent.....	\$252,794.70
Excess Dividend Tax.....	52,500.00

\$305,294.70

(Return this bill to the Comptroller with draft or check payable to State Treasurer.)

The tax specified is due and payable August 1st. Interest attaches after that date.

State of New York, Treasurer's Office.

\$305,294.70.

ALBANY, Aug. 20, 1908.

Received from the above-named Company — Three hundred and five thousand two hundred ninety-four 70/100 Dollars in full for above tax on Franchise or Business based on Gross Earnings.

R. G. MILKS,

Accountant and Transfer Officer.

J. A. WENDELL,

Ass't Second Deputy Comptroller.

- 83 *Application to Comptroller for Revision and Readjustment, Year Ending June 30, 1909, Attached as an Exhibit to Foregoing Petition.*

Before the State Comptroller.

In the Matter of the Application of INTERBOROUGH RAPID TRANSIT COMPANY for a Revision and Readjustment of the Amount Heretofore Audited and Stated by the Comptroller for Taxes under Section 185 of the Tax Law.

To the Honorable Charles H. Gaus, Comptroller of the State of New York:

The petition of Interborough Rapid Transit Company respectfully shows and alleges:

First. Your petitioner is a domestic corporation, duly organized May 6th, 1902, under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 4 of the Laws of 1891, entitled, "An Act to Provide for Rapid Transit Railroads in Cities of Over One Million Inhabitants," and the acts amendatory thereof and supplemental thereto.

Your petitioner was duly organized for the purpose, among others, of equipping, maintaining and operating a rapid transit railroad in the Boroughs of Manhattan and The Bronx, which, at the
84 time of petitioner's incorporation, was in process of construction under a contract made between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and John B. McDonald, dated February 21st, 1900, pursuant to the provisions of the said Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto, and pursuant to agreements amendatory to said contract.

Second. Since October 27th, 1904, petitioner has continuously operated the rapid transit railroad constructed under the said contract between the City of New York and John B. McDonald, the

lease or operating part of said contract, including the provisions for equipment of the road, having been duly assigned to petitioner by written assignment in accordance with the provisions of Chapter 4 of the Laws of 1891 and the various amendments thereto.

Since July 10th, 1905, petitioner has also continuously operated between Ann street and South Ferry, in the Borough of Manhattan and since May 10th, 1908, between Ann street, in the Borough of Manhattan, and Atlantic avenue, in the Borough of Brooklyn, the rapid transit railroad constructed pursuant to Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto and pursuant to a contract between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and the Rapid Transit Subway Construction Company, dated July 21st, 1902; the lease or operating part of the said contract having been duly assigned to petitioner by written assignment, pursuant to and in full accordance with the said Chapter 4 of the Laws of 1891 and the acts amendatory thereof.

Since April 1st, 1903, petitioner has also continuously operated the elevated railroad system of the Manhattan Railway Company in the Boroughs of Manhattan and The Bronx, City of New York, as lessee under a lease between the Manhattan Railway Company and petitioner, dated January 1, 1903.

Third. On or about August 3, 1909, petitioner filed in the office of the Comptroller of the State of New York a report of its gross earnings for the year ending June 30, 1909, a copy of which is hereto annexed, forming part of this petition, marked "Exhibit A." Petitioner avers that all of the facts stated in said report are true and that said report was made at the request of the Comptroller of the State of New York.

Fourth. Thereafter the Comptroller of the State of New York disregarding the protests and claims for exemption set forth in said report, audited and stated an account for taxes to be paid by petitioner and sent notice thereof to petitioner that the amount of taxes so audited and stated was three hundred and twenty-four thousand one hundred dollars and thirty-six cents, \$324,100.36).

Your petitioner alleges that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of the lines of the Manhattan Railway Company	\$143,530.17
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad constructed under the two contracts above mentioned	128,070.19
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Company dividends over 4 per cent.)	52,500.00
	<hr/>
	\$324,100.36

Fifth. Thereafter and on or about August 30, 1909, petitioner, under compulsion, deposited with the Comptroller of the State of New York, the sum of three hundred and twenty-four thousand, one hundred dollars and thirty-six cents (\$324,100.36), at 86 the same time protesting in writing against the assessment and deposit. A copy of the protest submitted at the time of making said deposit is hereto annexed, forming part of this petition, and marked "Exhibit B." Petitioner avers that all of the statements contained in said protest are true.

Sixth. Petitioner alleges and respectfully insists that the tax and assessment above set forth were illegal and erroneous, in that so much of said tax as purports to be assessed upon the gross earnings derived from the operation of the rapid transit railroad constructed under the aforementioned contracts, and so much thereof as purports to be a percentage upon the excess of dividends paid by the Interborough Rapid Transit Company in excess of 4 per cent., were not and could not be lawfully demanded for the reasons, among others, set forth in said report filed with the Comptroller, and the said written protest made and filed at the time of the deposit of the tax.

Wherefore, petitioner makes this application and prays that the account so audited and stated be revised and readjusted, and that said account be resettled by striking therefrom and crediting to the account of petitioner, the sum of one hundred and eighty thousand, five hundred and seventy dollars and nineteen cents (\$180,570.19), and that the petitioner may have such other and further relief in the premises as may be just and proper.

Dated, New York, September 21st, 1909.

INTERBOROUGH RAPID TRANSIT CO.,
By FRANK HEDLEY,
Vice-President and General Manager.

JAMES L. QUACKENBUSH,
Attorney for Petitioner.

165 Broadway, Borough of Manhattan, New York City, N. Y.

87 STATE OF NEW YORK,
County of New York, ss:

Frank Hedley, being duly sworn, deposes and says that he is the vice-president and general manager of the Interborough Rapid Transit Company, the petitioner named herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

FRANK HEDLEY,

Sworn to before me this 21st day of September, 1909.

[SEAL.]

FRED C. J. DELL,
Notary Public No. 156, New York County.

- 88 *Report of Relator to Comptroller, Year Ending June 30, 1909.—Attached as an Exhibit to Foregoing Petition.*

EXHIBIT A.

Report of the Gross Earnings in the State of New York, of the Interborough Rapid Transit Company for the Year Ending June 30, 1909, Made in Accordance with the Requirements of Chapter 908, Laws of 1896, Section 185.

Office of the Interborough Transit Company (Please Give P. O. Address with No. and Street), No. 165 Broadway, New York.

NEW YORK, August 2d, 1909.

1. Organized under the laws of the State of New York.
 2. Date of organization of the company, May 6th, 1902.
 3. Total authorized capital of company..... \$35,000,000.00
 4. Whole number of shares of stock authorized.. 350,000.00
 5. Number of shares of stock issued..... 350,000.00
 6. Par value of each share..... \$100.00
 7. Amount paid into the treasury of the company on each share..... 100.00
 8. Amount of capital paid in..... 35,000,000.00
 9. Amount of capital upon which dividends were declared 35,000,000.00
 10. Date of each dividend declared, Oct. 1, 1908, \$787,500; Jan. 1, 1909, \$787,500; Apr. 1, 1909, \$787,500; July 1, 1909, \$787,500... 3,150,000.00
- 89
11. Amount of each dividend declared..... ..
 12. Rate per cent. per annum of dividends..... 9 per cent.
 13. Gross earnings derived from all sources during the above period \$14,353,017.21

(Manhattan Ry. Div.; as to Rapid Transit Underground Road, see below.)

This report includes the gross earnings received from the Manhattan Railway Co. leased by Interborough Rapid Transit Company, and for which said company is liable to the State for the tax on gross earnings.

Names of companies leased: Manhattan Railway Company.

Interborough Rapid Transit Company operates as lessee the rapid transit railroad in the City of New York constructed by the City of New York under (1) Contract with John B. McDonald dated February 21, 1900, and (2) Contract with Rapid Transit Subway Construction Company dated July 21, 1902. The lease or operating part of each of said contracts was duly assigned to Interborough Rapid Transit Company by written assignments in accordance with

the provisions of Chapter 4 of the Laws of 1891, known as the Rapid Transit Act, and the various amendments thereto. By the provisions of Section 35 of said act as it existed at the time of entering into each of the several contracts above mentioned, the corporation operating any rapid transit railroad constructed thereunder was exempted from all taxation with respect to its interest in the lease of such railroad. And such exemption was continued in full force and effect as to the railroads constructed under said contracts by Chapter 599 of the Laws of 1905, which amended Section 35 of the Rapid Transit Act.

90 Interborough Rapid Transit Company therefore alleges and insists that its earnings from operation of the said rapid transit railroad constructed under the two contracts above mentioned, are exempt and not taxable under Section 185 of the Tax Law of the State of New York or under any other provision of law.

The company further alleges that said rapid transit railroad was constructed solely under Chapter 4 of the Laws of 1891 and the amendments thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax Law. Interborough Rapid Transit Company protests that gross earnings from operation of the said rapid transit railroad are not taxable and that the company is not required by law to make a statement of its gross earnings from such operation. Under protest, therefore, the company states that the gross earnings derived from the operation of such rapid transit railroad for the year ending June 30th, 1909, were \$12,807,018.96.

(Signed)

J. H. CAMPBELL, *Treasurer.*

91 STATE OF NEW YORK,

County of New York, ss:

On this 2d day of August, 1909, personally appeared before me, a notary public in and for the County of New York, J. H. Campbell, treasurer of the above named company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct, according as the accounts stand in the books of the company, and that it includes all dividends, whether cash, scrip or of any other character or description, declared by said company during the year ending on the first day of July, 1909.

(Signed)

J. H. CAMPBELL.

Sworn to and subscribed before me the day and year aforesaid.

(Signed)

JOHN M. BURNET,

Notary Public, New York County, N. Y.

- 92 *Letter of Protest from J. H. Campbell to Comptroller, Dated August 30, 1909, Attached as an Exhibit to Foregoing Petition.*

EXHIBIT B.

Aug. 30, 1909.

Hon. Charles H. Gaus, Comptroller of the State of New York,
Albany, N. Y.

DEAR SIR: Acting for the Interborough Rapid Transit Company, and under protest on its behalf, I enclose herewith a check for \$324,100.36, being the amount stated by you and demanded as an account for taxes on gross earnings and excess dividends claimed by you to be due under Section 185 of the Tax Law from Interborough Rapid Transit Company for the year ending June 30th, 1909. This company protests and alleges that it is taxable under Section 185 of the Tax Law only upon gross earnings of the elevated railroads leased from Manhattan Railway Company; that is to say, taxable only to the extent of 1 per cent. on \$14,353,017.21, which is \$143,530.17, and that the further sum of \$180,570.19 has been added to and included in the statement of account by you without any authority of law.

Interborough Rapid Transit Company operates as lessee the rapid transit railroad in the City of New York, constructed by the City of New York under (1) Contract with John B. McDonald, dated February 21st, 1900, and (2) Contract with Rapid Transit Subway Construction Company, dated July 21, 1902. The lease or operating part of each of said contracts was duly assigned to Inter-
93 borough Rapid Transit Company by written assignments in accordance with provisions of Chapter 4 of the Laws of 1891, known as the Rapid Transit Act, and the various amendments thereto. By the provisions of Section 35 of said act as it existed at the time of entering into each of the several contracts above mentioned, the corporation operating any rapid transit railroad constructed thereunder, was exempted from all taxation with respect to its interest in such railroad and such exemption was continued in full force and effect as to the railroad constructed under each of said contracts by Chapter 599 of the Laws of 1905, which amended Section 35 of the Rapid Transit Act. Interborough Rapid Transit Company therefore alleges and insists that its earnings from operation of the said rapid transit railroad constructed under the two contracts above mentioned, are exempt and not taxable under Section 185 of the Tax Law of the State of New York, or under any other provision of law.

This company further alleges that said rapid transit railroad was constructed solely under Chapter 4 of the Laws of 1891 and the amendments thereto, and is not an elevated railroad or surface railroad not operated by steam within the meaning of Section 185 of the Tax Law. Interborough Rapid Transit Company protests that the gross earnings from operation of said rapid transit railroad are not taxable under Section 185 of the Tax Law or any other provision of law.

This company further protests and alleges that the full amount of dividends paid by it during the year ending on July 1, 1909, was \$3,150,000, which sum was entirely net earnings from the said rapid transit railroad constructed under Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto; and was net earnings from the operation thereof, which this company protests and insists is not taxable by the State of New York under any provision of law.

Interborough Rapid Transit Company, therefore, in depositing the full amount stated in the account, to wit, \$324,100.36, reiterates that the sum of \$180,570.19 has been included by you in the aforesaid statement of account for taxes without any authority of law, and said sum is herewith deposited with you under protest for the reasons above set forth, and heretofore set forth more fully in the report of this company, duly verified August 2d, 1909, and filed in your office on August 3d, 1909.

Very respectfully yours,

J. H. CAMPBELL, *Treasurer.*

95 *Account Year Ending June 30, 1909, Attached as an Exhibit to Foregoing Petition.*

Comptroller's Office, Albany, N. Y.

The Interborough Rapid Transit Co., J. H. Campbell, *Treasurer*,
165 Broadway, N. Y. C., in Account with the State of New York,
Dr.

For Tax on Franchise or Business, Based on Gross Earnings, per Chap. 908, Laws of 1896, and the Acts amendatory thereof, for year ending June 30, 1909, as per report filed. Gross Earnings, \$27,160,036.17.

Tax at rate of one per cent.....	\$271,600.36
Tax on excess dividend.....	52,500.00
	<hr/>
	\$324,100.36

(Return this bill to the Comptroller with draft or check payable to State Treasurer.)

The tax specified is due and payable August 1st. Interest attaches after that date.

State of New York, Treasurer's Office.

\$324,100 36/100.

ALBANY, Sept. 2, 1909.

Received from the above named Company Three hundred twenty-four thousand one hundred 36/100 Dollars, in full for above tax on Franchise or Business based on Gross Earnings.

H. H. PRYOR,
Deputy Treasurer.

OTTO KELSEY,
Deputy Comptroller.

- 96 *First Determination upon Application for Revision and Readjustment, Three Years Ending June 30, 1909, Attached as an Exhibit of Foregoing Petition.*

Otto Kelsey, Deputy Comptroller.
Charles H. Gaus, Comptroller.
Willis B. Merriman, 2d Deputy Comptroller.

STATE OF NEW YORK,
[SEAL.] Comptroller's Office.

ALBANY, November 10, 1909.

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY, for a Revision and Resettlement of Taxes Assessed against it under the Provisions of Chapter 908, Laws of N. Y. 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above named Interborough Rapid Transit Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the three years ending June 30, 1909, and the said Comptroller having heard proofs offered on behalf of the said Interborough Rapid Transit Company in support of said application, after due consideration thereof the Comptroller does determine that the assessment heretofore made against the said Interborough Rapid Transit Company, does not include taxes which could not have been lawfully demanded, and therefore declines to make any revision or readjustment of the same.

OTTO KELSEY,
Deputy and Acting Comptroller.

- 97 *Application to Comptroller for Revision and Readjustment, Year Ending June 30, 1910, Attached as an Exhibit to Foregoing Petition.*

Before the State Comptroller.

In the Matter of the Application of INTERBOROUGH RAPID TRANSIT COMPANY for a Revision and Readjustment of the Amount Heretofore Audited and Stated by the Comptroller for Taxes under Section 185 of the Tax Law for the Year Ending June 30, 1910.

To the Honorable William Sohmer, Comptroller of the State of New York:

The petition of Interborough Rapid Transit Company respectfully shows and alleges:

First. Your petitioner is a domestic corporation duly organized May 6, 1902, under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 4 of the Laws of 1891, entitled, "An Act to provide for

rapid transit railroads in cities of over one million inhabitants," and the acts amendatory thereof and supplemental thereto.

Your petitioner was duly organized for the purpose, among others, of equipping, maintaining and operating a rapid transit railroad in the Boroughs of Manhattan and The Bronx, which, at the time of petitioner's incorporation, was in process of construction under a contract made between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and John B. McDonald, dated February 21, 1900, pursuant to the provisions of the said Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto, and pursuant to agreements amendatory to said contract.

Second. Since October 27, 1904, petitioner has continuously operated the rapid transit railroad constructed under the said contract between the City of New York and John B. McDonald, the lease or operating part of said contract, including the provisions for equipment of the road, having been duly assigned to petitioner by written assignment in accordance with the provisions of Chapter 4 of the Laws of 1891 and the various amendments thereto.

Since July, 1905, petitioner has also continuously operated between Ann street and South Ferry, in the Borough of Manhattan, and since May 10, 1908, between Ann street, in the Borough of Manhattan, and Atlantic avenue, in the Borough of Brooklyn, the rapid transit railroad constructed pursuant to Chapter 4 of the Laws of 1891 and the acts amendatory thereof and supplemental thereto, and pursuant to a contract between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners), and the Rapid Transit Subway Construction Company, dated July 21, 1902; the lease or operating part of the said contract having been duly assigned to petitioner by written assignment, pursuant to and in full accordance with the said Chapter 4 of the Laws of 1891 and the acts amendatory thereof

Since April 1, 1903, petitioner has also continuously operated the elevated railroad system of the Manhattan Railway Company in the Boroughs of Manhattan and The Bronx, City of New York, as lessee under a lease between the Manhattan Railway Company and petitioner, dated January 1, 1903.

Third. On or about the 27th day of July, 1910, petitioner filed in the office of the Comptroller of the State of New York a report of its gross earnings for the year ending June 30, 1910, a copy of which is hereto annexed, forming part of this petition, marked "Exhibit A." Petitioner avers that all the facts stated in said report are true, and that said report was made at the request of the Comptroller of the State of New York.

Fourth. Thereafter the Comptroller, disregarding the protests and claims for exemption set forth in said report, audited and stated an account for taxes to be paid by petitioner, and sent notice thereof to petitioner that the amount of taxes so audited and stated was \$346,767.09.

Your petitioner alleges, upon information and belief, that the amount so stated was made up as follows:

1 per cent. upon gross earnings received by petitioner from operation of the lines of the Manhattan Railway Company	\$151,087.14
1 per cent. upon gross earnings received by petitioner from operation of the rapid transit railroad constructed under the two contracts above mentioned. .	143,179.95
3 per cent. upon \$1,750,000 (excess of Interborough Rapid Transit Company dividend over 4 per cent)	52,500.00
	<hr/>
	\$346,767.09

100 Fifth. Thereafter, and on or about August 10 1910, petitioner, under compulsion, deposited with the Comptroller of the State of New York the sum of \$346,767.09, at the same time protesting in writing against the assessment and tax. A copy of the protest submitted at the time of making said deposit is hereto annexed, forming part of his petition and marked "Exhibit B."

Sixth. Petitioner alleges that the assessment and franchise tax above set forth were and are illegal and erroneous in that so much of said tax as purports to be measured by a percentage upon petitioner's gross earnings derived from the operation of the rapid transit railroad above referred to, and so much thereof as purports to be measured by a percentage upon dividends paid by petitioner in excess of 4 per cent. upon the total amount of its paid-up capital stock, were not and could not be lawfully demanded for the reason that this company is not subject to a franchise tax with respect to its operation of the said rapid transit railroad under the provisions of Section 185 of the Tax Law, or under any other provision of law. That its said earnings are exempt from all taxation, and that petitioner is likewise exempt from taxation because of such earnings and that the said section of the Tax Law, in so far as it purports to authorize the tax herein referred to, constitutes an impairment of a valid contract existing between the State of New York and your petitioner and is in violation of that portion of subdivision 1 of section 10 of article 1 of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of a contract, and for the further reason that any tax imposed upon this company under the alleged authority of said section or any decision of the Comptroller which would sustain said tax, is, for the same reason, unconstitutional and void.

101 Wherefore, and by reason of the facts and reasons more fully set forth in Exhibits A and B, hereto annexed, petitioner makes this application and prays that the account so audited and stated be revised and readjusted, and that said account be resettled by striking therefrom and crediting to the account of petitioner, the sum of \$195,679.95. and that your petitioner may have herein such other and further relief in the premises as may be just and proper.

Dated, New York, January —, 1911.

INTERBOROUGH RAPID TRANSIT CO.,
By FRANK HEDLEY,
Vice-President and General Manager.

JAMES L. QUACKENBUSH,
Attorney for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Frank Hedley, being duly sworn, deposes and says that he is the Vice-President and General Manager of the Interborough Rapid Transit Company, the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

FRANK HEDLEY.

Sworn to before me this 10th day of January, 1911.

FREDERICK J. DELL,

Notary Public, 156, N. Y. County, Register's No. 1162.

102 Report of Relator to Comptroller, Year Ending June 30,
1910, Attached as an Exhibit to Foregoing Petition.

"A."

Report of the gross earnings in the State of New York of the Interborough Rapid Transit Company for the year ending June 30, 1910, made in accordance with the requirements of Section 192 of the Tax Law.

Office of the Interborough Rapid Transit Company (Please give P. O. address with No. and Street), 165 Broadway, New York.

July 26th, 1910.

1. Organized under the laws of the State of New York.
2. Date of organization of the Company, May 6th, 1902.
3. Total authorized Capital of Company..... \$35,000,000.00
4. Whole number of shares of stock authorized... 350,000.00
5. Number of shares of stock issued..... 350,000.00
6. Par value of each share..... \$100.00
7. Amount paid into the Treasury of the Company on each share..... 100.00
8. Amount of Capital paid in..... 35,000,000.00
9. Amount of Capital upon which dividends were declared 35,000,000.00
10. Date of each Dividend declared, Oct. 1, 1909; Jan. 1, 1910; Apr. 1, 1910; July 1, 1910... 3,150,000.00
11. Amount of each dividend declared.....
12. Rate per cent. per annum of dividends..... 9 per cent.
13. Gross Earnings derived from all sources during the above period..... \$15,108,713.90

103 The report as given above states only the gross earnings received by the Interborough Rapid Transit Company from the operation of the elevated railroads of the Manhattan Railway Company for the year ended June 30th, 1910, and for which the former company is liable to pay a franchise tax measured by a percentage on said gross earnings under the terms of its lease from the Manhattan Railway Company, dated January 1st, 1903.

Names of companies leased: Manhattan Railway Company.

Interborough Rapid Transit Company operates as lessee the rapid transit railroad in the City of New York or "subway" constructed by the City of New York under (1) contract with John B. McDonald, dated February 21, 1900, and (2) contract with Rapid Transit Subway Construction Company, dated July 21st, 1902. The lease or operating part of each of said contracts was duly assigned to Interborough Rapid Transit Company by written assignments in accordance with the provisions of Chapter 4 of the Laws of 1891, known as Rapid Transit Act, and the various amendments thereto.

By the provisions of Section 35 of said act as it existed at the time of entering into each of the said contracts—Sec. 35 of Chap. 752 of the Laws of 1894, as amended by Chap. 729 of the Laws of 1896 and Chap. 616 of the Laws of 1900—the corporation operating any rapid transit railroad constructed thereunder was exempted from all taxation with respect to its interest in such contract and in such railroad. And such exemption was continued in full force and effect as to the railroads constructed under said contracts, by Chap. 599 of the Laws of 1905, which amended Section 35 of the Rapid Transit Act.

Interborough Rapid Transit Company therefore alleges and insists that it is not subject to a franchise tax measured by a percentage upon its earnings from the said rapid transit railroad, under the provisions of Sec. 185 of the Tax Law or under any other provision of law; that its said earnings are exempt from all taxation and that the company itself is likewise exempt from all taxation because of such earnings. And this company alleges that the said section, in so far as it purports to authorize a franchise tax upon this company, measured by a percentage on its gross earnings from the said rapid transit railroad, constitutes an impairment of the contract existing between the State of New York, the City of New York and the Interborough Rapid Transit Company, wherein the first two parties agreed that this company should be exempt from all taxation with respect to its interests in said rapid transit railroad, and is in violation of that portion of sub-division 1, of section 10 of article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts; and further that any tax imposed upon this company measured by a percentage upon its subway earnings, under the alleged authority of said section, is for the same reason unconstitutional and void.

This company further alleges that the said rapid transit railroad was constructed solely under the provisions of Chap. 4 of the Laws of

1891 and the amendments thereto and is not an elevated railroad or surface railroad not operated by steam, within the meaning of Sec. 185 of the Tax Law.

Interborough Rapid Transit Company reiterates that it is not subject to a franchise tax measured by a percentage upon its earnings from a rapid transit railroad and that such earnings themselves are not taxable under that section, and protests that the company is not required by law to make a statement of its gross earnings from such operation. Under protest therefore, and in order to avoid the penalties prescribed in the tax law, this company states that the gross earnings received by it from the operation of such rapid transit railroad for the year ended June 30, 1910, were \$14,317,-994.85.

This company shows that the full amount of dividends paid by it during the year ended June 30th, 1910, was \$3,150,000 or 9% upon its paid-up capital and that the entire sum so paid in dividends was net earnings from the rapid transit railroad constructed under Chap. 4 of the Laws of 1891, and the amendments thereto, and was net earnings from the operation thereof, which earnings this company protests and alleges, for the reasons above set forth, do not make it liable to a franchise tax measured by a percentage on such dividends, under the provisions of Sec. 185 of the Tax Law or under any other provision of law.

(Signed)

J. H. CAMPBELL, *Treasurer.*

STATE OF NEW YORK,
County of New York, ss:

On this 26th day of July, 1910, personally appeared before me a Notary Public in and for the County of New York, J. H. Campbell, Treasurer of the above named Company, who, being duly sworn according to law, did depose and say, that the foregoing report is just, true and correct according as the accounts stand in the books of the Company, and that it includes all dividends, whether cash, stock, scrip of any other character or description, declared by said Company during the year ending on the 1st day of July, 1910.

(Signed)

J. H. CAMPBELL, *Treasurer.*

Sworn to and subscribed before me the 26th day and year aforesaid.

[SEAL.]

JOHN M. BURNET,
Notary Public.

106 *Letter of Protest from J. H. Campbell to Comptroller, Dated August 30, 1910, Attached as an Exhibit to Foregoing Petition.*

"B."

August 30th, 1910.

Hon. Clark Williams, Comptroller of the State of New York,
Albany, N. Y.

SIR: Acting for the Interborough Rapid Transit Company, and under protest on its behalf, I enclose herewith this Company's check to your order for \$346,767.09, being the amount audited and demanded by you as an account for franchise taxes assessed under section 185 of the Tax Law from Interborough Rapid Transit Company for the year ending June 30, 1910, and stated by you to be measured by percentages upon its gross earnings and dividends paid in excess of 4% for that year. This Company protests and alleges that it is subject to the franchise tax imposed by Sec. 185 of the Tax Law only to the extent of a percentage upon its gross earnings from the operation of the elevated railroads leased from the Manhattan Railway Company; that is to say: taxable only to the extent of 1% upon \$15,108,713.90, which is \$151,087.14, and that the further sum of \$195,679.95 has been added to and included in the statement of account rendered by you without any authority of law.

Interborough Rapid Transit Company operates as lessee the rapid transit railroad in the City of New York or "subway" constructed by the City of New York under (1) contract with John B. McDonald dated February 21, 1900; and (2) contract with
107 Rapid Transit Subway Construction Company, dated July 21, 1902. The lease or operating part of each of said contracts was duly assigned to Interborough Rapid Transit Company by written assignments in accordance with the provisions of Chapter 4 of the Laws of 1891, known as Rapid Transit Act, and by the various amendments thereto.

By the provisions of Section 35 of said act as it existed at the time of entering into each of the said contracts—Sec. 35 of Chapter 75 of the Laws of 1894, as amended by Chapter 729 of the Laws of 1898 and Chapter 616 of the Laws of 1900—the corporation operating any rapid transit railroad constructed thereunder was exempted from all taxation with respect to its interest in such contract and in such railroad. And such exemption was continued in full force and effect as to the railroads constructed under said contracts, by Chapter 599 of the Laws of 1905, which amended Sec. 35 of the Rapid Transit Act.

Interborough Rapid Transit Company therefore alleges and insists that it is not subject to a franchise tax measured by a percentage upon its earnings from the said rapid transit railroad, under the provisions of Sec. 185 of the Tax Law or under any other provision of law; that its said earnings are exempt from all taxation and that the Company itself is likewise exempt from all taxation because of such earnings. And this Company alleges that the said section, in

far as it purports to authorize a franchise tax upon this Company, measured by a percentage on its gross earnings from the said rapid transit railroad, constitutes an impairment of the contract existing between the State of New York, the City of New York, and the Interborough Rapid Transit Company, wherein the first two parties agreed that this Company should be exempt from all taxation with respect

108 to its interest in said rapid transit railroad, and is in violation of that portion of subdivision 1, of section 10 of article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts; and further, that any tax imposed upon this Company, measured by a percentage upon its subway earnings, under the alleged authority of said section, is for the same reason, unconstitutional and void.

This company further alleges that the said rapid transit railroad was constructed solely under the provisions of Chap. 4 of the Laws of 1891 and the amendments thereto and is not an elevated railroad or surface railroad not operated by steam, within the meaning of Sec. 185 of the Tax Law.

This Company shows that the full amount of dividends paid by it during the year ending June 30, 1910, was \$3,150,000, or 9% upon its paid-up capital, and that the entire sum so paid in dividends was net earnings from the rapid transit railroad constructed under Chap. 4 of the Laws of 1891, and the amendments thereto, and was net earnings from the operation thereof, which earnings this Company protests and alleges, for the reasons above set forth, do not made it liable to a franchise tax measured by a percentage on such dividends, under the provisions of Sec. 185 of the Tax Law or under any other provision of law.

Interborough Rapid Transit Company therefore, in depositing the full amount stated in the said account, to wit, \$346,767.09, reiterates that the sum of \$195,679.95 has been included by you in the aforesaid statement of account for taxes without any authority of law, and said sum is herewith deposited with you and paid under protest, for the reasons above set forth and heretofore placed before you as part of the report of this Company for the year ending June 30, 1910, which was filed in your office on July 28th, 1910, and in order to avoid the penalties prescribed in the Tax Law.

J. H. CAMPBELL, *Treasurer.*

109 *Account Year Ending June 30, 1910, Attached as an Exhibit to Foregoing Petition.*

The Interborough Rapid Transit Co., J. H. Campbell, 165 Broadway, N. Y. C., in Account with the State of New York, Dr.

* * * * *

For tax on Franchise or Business based on gross earnings, per Chap. 60 of the Consolidated Tax Law, for year ending June 30, 1910, as per report filed.

Gross earnings, \$29,426,708.75.

Tax at rate of one per cent.....	\$294,267.00
Tax on Excess Dividend.....	52,500.00
	<hr/>
	\$346,767.00

Aug. 3, 1910.

* * * * *

(Return the bill to the Comptroller with draft or check payable to State Treasurer.)

The tax specified is due and payable August 1st. Interest attaches after that date.

* * * * *

Received Aug. 31, 1910, Comptroller's Office, State of New York.
\$346,767.09/100.

State of New York, Treasurer's Office.

ALBANY, Sept. 2, 1910.

Received from the above-named Company, Three hundred forty-six thousand seven hundred sixty-seven 09/100 Dollars in full for above tax on Franchise or Business based on Gross Earnings.

E. P. KEARNEY,
Assistant Deputy Comptroller.
H. H. PRYOR,
Deputy Treasurer.

- 110 *Second Determination upon Applications for Revision and Readjustment, Three Years, Ending June 30, 1909, Attached as an Exhibit to Foregoing Petition.*

ALBANY, August 15, 1911.

In the Matter of the Assessment of the INTERBOROUGH RAPID TRANSIT COMPANY for the Period Beginning July 1, 1906, and Ending June 30, 1909, under the Provisions of Article 9 of the Tax Law.

An order having been made by the Court of Appeals of the State of New York (200 N. Y., 93), in which a new assessment was ordered, and the Court of Appeals having stated that "We now see no reason to doubt that within sections 182 and 184 of the Tax Law are provisions broad enough to provide for the franchise tax against the relator in respect of its equipment, maintenance and the operation of the subway roads," and the said Court of Appeals having in substance decided that said corporation was taxable at the rate of one percentum upon its gross receipts from the operation of the Elevated Road, by it termed the "Elevated Division," and "that within sections 182 and 184 of the Tax Law are provisions broad enough to provide for the franchise tax against the relator in respect of its equipment, maintenance and the operation of the subway roads," and it appearing from an examination of said

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sections 182 and 184 of the Tax Law that as to its capital stock upon which dividends have been declared at the rate of nine per cent per annum, the tax should have been assessed at two and one-fourth mills on each dollar of the par value of its entire capital stock, amounting to \$35,000,000, and that under section 184 of the Tax Law its receipts from all other sources, save those from the operation of the so-called Elevated Division, should have been taxed at the rate of five mills upon each dollar of such receipts.

Now, therefore, the Comptroller of the State of New York does hereby determine that the assessment heretofore made against said Interborough Rapid Transit Company was, in accordance with the determination of the Court of Appeals (200 N. Y., 93), so made as to include taxes which could not have been lawfully demanded.

And, therefore, the taxes covering the period from June 30, 1906, to July 1, 1909, are re-assessed in accordance with the determination of the Court as follows:

For taxes on capital stock based on business for the year ending October 31, 1906, on \$35,000,000, dividend $8\frac{1}{4}\%$, rate 2 1-16 mills.....	\$72,187.50
For tax on gross earnings, Elevated Division, for the year ending June 30, 1907, on \$14,491,682.36, rate 1%	144.916.82
For tax in gross earnings, Subway Division, for the year ending June 30, 1907, on \$8,765,650.65 at 5 mills	43,828.25
For tax on capital stock based on business for the year ending October 31, 1907, on \$35,000,000, 9% dividend, rate $2\frac{1}{4}$ mills.....	78,750.00
112 For tax on gross earnings for the year ending June 30, 1908, Elevated Division, on \$14,485,873.87, rate 1%	144,958.74
For tax on gross earnings for the year ending June 30, 1908, Subway Division, on \$10,783,596.08, rate 5 mills	53,917.98
For tax on capital stock based on business for the year ending October 31, 1908, on \$35,000,000, 9% dividend, rate $2\frac{1}{4}$ mills.....	78,750.00
For tax on gross earnings for the year ending June 30, 1909, Elevated Division, on \$14,353,017.21, rate 1%	143,530.02
For tax on gross earnings for the year ending June 30, 1909, Subway Division, on \$12,807,018.96, rate five mills	64,035.09
Making the total amount of tax due for said period...	\$824,874.40
Instead of.....	\$914,468.39

And the said sum of Eight hundred twenty-four thousand, eight hundred seventy-four and 40/100 dollars is hereby determined as the amount which the said Interborough Rapid Transit Company

was liable to pay under the provisions of Article 9 of the Tax Law, for the period beginning July 1, 1906, and ending June 30, 1909.

M. J. WALSH,
Deputy Comptroller.

- 113 *Determination upon Application for Revision and Readjustment, Year Ending June 30, 1910, Attached as an Exhibit to Foregoing Petition.*

ALBANY, August 15, 1911.

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY for a Revision of the Taxes Assessed Against It for the Period Beginning July 1, 1909, and Ending June 30, 1910, under the Provisions of Article 9 of the Tax Law.

An application having been made by the above-named Interborough Rapid Transit Company for a revision and resettlement of the taxes assessed and determined against it by the Comptroller of the State of New York, for the period beginning July 1, 1909, and ending June 30, 1910, and the Comptroller having examined the proofs offered on behalf of the said Interborough Rapid Transit Company, in support of said application, and after due consideration thereof, together with the determination of the Court of Appeals in a similar matter (200 N. Y., 93), it is hereby determined that the assessment heretofore made against the said Interborough Rapid Transit Company for the sum of Three hundred forty-six thousand, seven hundred sixty-seven and 9/100 dollars should be reduced to the sum of Three hundred one thousand, four hundred twenty-seven and 11/100 dollars, consisting of the following items:

114	duced to the sum of Three hundred one thousand, four hundred twenty-seven and 11/100 dollars, consisting of the following items:	
	For tax on capital stock based on business for the year ending October 31, 1909, on \$35,000,000, 9% dividend, rate 2¼ mills.....	\$78,750.00
	For tax on gross earnings for the year ending June 30, 1910, Elevated Division, on \$15,108,713.90, rate 1%	151,087.14
	For tax on gross earnings for the year ending June 30, 1910, Subway Division, on \$14,317,994.85, rate 5 mills	71,589.97
	Making a total of	\$301,427.11

which said sum is hereby determined as the amount which the said Interborough Rapid Transit Company was liable to pay under the provisions of Article 9 of the Tax Law, for the period beginning July 1, 1909, and ending June 30, 1910.

M. J. WALSH,
Deputy Comptroller.

Undertaking.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY
against
WILLIAM SOHMER, as Comptroller of the State of New York.

Franchise Taxes, Years Ending June 30, 1907; June 30, 1908;
June 30, 1909; June 30, 1910.

Whereas, the above-named Interborough Rapid Transit Company heretofore applied to the Comptroller of the State of New York to revise and readjust the accounts audited and stated by the said Comptroller imposing franchise taxes upon the Interborough Rapid Transit Company for the years ending June 30, 1907, June 30, 1908, and June 30, 1909, under the provisions of Section 185 of the Tax Law, and the said Comptroller having denied said applications; and

Whereas, the Interborough Rapid Transit Company duly reviewed the action of said Comptroller in denying said applications in a certiorari proceeding in the manner provided by the Tax Law, and the Supreme Court having by its final order in said proceeding annulled the determination of the Comptroller, and having directed a new assessment against the Interborough Rapid Transit Company; and

Whereas, the Comptroller of the State of New York did, on or about the 15th day of August, 1911, make a new determination with respect to franchise taxes assessed against Relator for the three years ending June 30, 1909; and

Whereas, the above-named Interborough Rapid Transit Company heretofore applied to the Comptroller of the State of New York to revise and readjust the account heretofore audited and stated by the said Comptroller, imposing a tax against the Interborough Rapid Transit Company for the year ending June 30, 1910, under the provisions of Section 185 of the Tax Law; and

Whereas, on or about the 15th day of August, 1911, said Comptroller made his determination upon said application wherein he purported to partially revise and readjust said account for the year ending June 30, 1910; and

Whereas, said Interborough Rapid Transit Company, feeling aggrieved by the second determination of the Comptroller with respect to the reaudit and reassessment of franchise taxes against it for the three years ending June 30, 1909, and by the determination of the Comptroller with respect to the franchise taxes assessed against it for the year ending June 30, 1910, is about to apply to the Supreme Court of the State of New York for a writ of certiorari, under the provisions of the Tax Law, to review the action of the said Comptroller.

Now, therefore, The Title Guaranty & Surety Company, a corporation duly organized under the Laws of the State of Pennsylvania, to execute surety bonds, and having an office at No. 84 William Street, Borough of Manhattan, City of New York, does hereby undertake that if the said writ of certiorari which may be granted upon the application of said Interborough Rapid Transit Company to review the said determination be dismissed, or the determination of the said Comptroller be confirmed, the said Interborough Rapid Transit Company will pay all costs and charges which may accrue
 117 against it in the prosecution of the said writ, including the cost of all appeals, not exceeding the sum of Five hundred dollars (\$500).

Dated, September 16th, 1911.

THE TITLE GUARANTY & SURETY
 COMPANY,
 By GEO. W. YUENGLING,
Attorney-in-Fact.

Attest:

RICHARD K. MCGONIGAL,
Resident Secretary.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

On September 18th, 1911, before me personally appeared Geo. W. Yuengling, to me known, who, being by me duly sworn, did depose and say: That he resided in the City of New York; that he is the Attorney-in-Fact of The Title Guaranty & Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720, of the New York Session Laws of 1893.

And the said Geo. W. Yuengling further said that he was acquainted with Richard K. McGonigal and knew him to be the Resident Assistant Secretary of said corporation; that the signature of said Richard K. McGonigal subscribed to the said instrument is in the genuine handwriting of said Richard K. McGonigal and was thereto subscribed by like order of said Board of Directors
 118 and in the presence of him, the said Geo. W. Yuengling.

DANIEL O. DEASY,
Notary Public, New York County.

At a meeting of the Executive Committee of The Title Guaranty & Surety Company, Scranton, Pa., held at the office of the Company, on the 24th day of December, A. D., 1910, the following resolution was adopted:

Resolved, that this Company do and it hereby does authorize and empower Fred C. Williams, as Attorney-in-Fact, attested by Geo. W. Yuengling, Resident Secretary, or Richard K. McGonigal, Resident

Assistant Secretary; or Geo. W. Yuengling, Attorney-in-Fact, attested by Richard K. McGonigal, Resident Assistant Secretary, to execute, deliver and attach the seal of the Company to any and all bonds, recognizances or contracts of indemnity, and all instruments of reinsurance, and all other writings obligatory in the nature thereof, and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts and executing and guaranteeing bonds or undertakings required or permitted in all actions or proceedings or by law allowed.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

I, Richard K. McGonigal, Resident Assistant Secretary of The Title Guaranty & Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a
 119 correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and the seal of the Company at the City of New York, on September 18th, 1911.

RICHARD K. MCGONIGAL,
Asst Resident Secretary.

Endorsement: Supreme Court, Albany County. The People of the State of New York, on the Relation of Interborough Rapid Transit Company, against William Sohmer, as Comptroller of the State of New York. Undertaking. James L. Quackenbush, Attorney for Relator, 165 Broadway, Borough of Manhattan, New York City.

The within undertaking is hereby approved as to sufficiency and amount.

EDWARD J. GAVEGAN,
Justice of the Supreme Court.

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Writ of Certiorari.

People of the State of New York on the Relation of Interborough Rapid Transit Company to William Sohmer, as Comptroller of the State of New York, Greeting:

Whereas, we have been informed by the petition of Interborough Rapid Transit Company, duly verified the 21st day of September, 1911, that certain proceedings have been had before you as Comptroller of the State of New York and your predecessors in that office, upon the applications of the said Interborough Rapid Transit Company, to revise and readjust the accounts theretofore audited and stated by you for franchise taxes to be paid by the Interborough Rapid Transit Company under the provisions of Section 185 of the Tax Law for the year ending June 30, 1907, June 30, 1908, and June 30, 1909, measured by a percentage upon its gross earnings and dividends paid by it, wherein, pursuant to the mandate of our Supreme Court contained in a final order entered December 24,

1910, upon a decision of the Court of Appeals of the State of New York, in a proceeding heretofore instituted by petitioner to review the first decision and determination of the Comptroller of the State of New York with reference to taxes for each of said years, you, the said Comptroller, have made your second determination herein, dated August 15, 1911, purporting to revise and readjust said accounts and holding that said petitioner is liable for franchise taxes under the provisions of Sections 182, 184 and 185 of the Tax Law for each of the years above mentioned, all in the manner and to the extent set forth in said petition; and

Whereas, we have been further informed by the said petition that certain proceedings have been had before you, as Comptroller of the State of New York, upon the application of said Interborough Rapid

Transit Company, to revise and readjust the accounts heretofore audited and stated by you for franchise taxes to be paid by the Interborough Rapid Transit Company under the provisions of Section 185 of the Tax Law for the year ending June 30, 1910, measured by a percentage upon its gross earnings and dividends paid by it, wherein you, the said Comptroller, made a determination dated August 15, 1911, purporting to revise and readjust said accounts and holding that petitioner was subject to franchise taxes for the year ending June 30, 1910, under the provisions of Sections 182, 184 and 185 of the Tax Law, all in the manner and to the extent set forth in said petition; and

Whereas, we have been further informed by the said petition that the full amount of taxes, percentages, interest and other charges audited and stated in each of such accounts has been duly deposited with the Treasurer of the State of New York, as required by law, and that the said accounts, as revised and readjusted and settled by the Comptroller in the determination referred to in the petition, include taxes and charges which could not be lawfully demanded, and that petitioner is prejudiced and aggrieved thereby, and that you, William Sohmer, as Comptroller of the State of New York, have in your custody and under your control, the said applications and the reports, evidence, documents and other records and papers upon which said determinations, and each of them, was made, and said Interborough Rapid Transit Company having now made application to this Court for a writ of certiorari to review your said decisions and determinations, and we being willing to be certified of such proceedings,

Do hereby command and strictly enjoin you, William Sohmer, as Comptroller of the State of New York, to certify and return all and singular the evidence before you on such applications, and all the papers and proofs upon the original statements of such accounts and all proceedings thereon and all your decisions and actions in the premises, with all the evidence, documents, reports, records and papers relating thereto, in your possession or under your control, submitted to or considered by you in rendering the said accounts, together with a statement of the grounds upon which your second determination with respect to franchise taxes assessed against petitioner for the years ending June 30, 1907,

June 30, 1908, and June 30, 1909, was made, and also the grounds of your determination with respect to the franchise taxes assessed against petitioner for the year ending June 30, 1910, within twenty (20) days after the service upon you of this writ, at the office of the Clerk of Albany County, under your hand, pursuant to the provisions of the Tax Law in such case made and provided, and the provisions of Title II of Chapter 16 of the Code of Civil Procedure, to the end that our Supreme Court may further cause to be done thereon what of right and according to law, ought to be done, and that you have then and there, this writ.

Witness, Hon. Alden Chester, Presiding Justice of our Supreme Court, at the City Hall in the City of Albany, this 30th day of September, 1911.

[SEAL.]

WILLIAM J. GRATTAN, *Clerk.*

JAMES L. QUACKENBUSH,

*Attorney for Relator, 165 Broadway,
Borough of Manhattan, New York City.*

The foregoing writ is hereby allowed this 30th day of September, 1911.

ALDEN CHESTER,
Justice of the Supreme Court.

123 *Admission of Service of Writ by Comptroller.*

Service of a copy of the within writ with a copy of the petition and exhibits and order on which the writ was allowed, is admitted this 30th day of September, 1911.

E. P. KEARNY,
Assistant Deputy Comptroller.

Return.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of INTER-BOROUGH RAPID TRANSIT COMPANY

against

WILLIAM SOHMER, as Comptroller of the State of New York.

William Sohmer, as Comptroller of the State of New York, making return to the writ of certiorari issued out of this Court on the 30th day of September, 1911, a copy of which is hereto annexed:

By virtue of and in obedience to said writ of certiorari certifies and returns to this Court the accounts and all the evidence taken
124 before him on such application and all the papers and proofs upon the original statement of such account and all proceedings thereon, documents, records submitted to or considered by him, together with his action and decision in the premise, to wit:

Report of relator for the year ending June 30, 1907.

Account of tax for year ending June 30, 1907.

Petition to Comptroller for revision and readjustment of tax for the year 1907, together with letter of protest from D. W. McWilliams to Hon. Martin H. Glynn, Comptroller, dated October 31, 1907.

Report of company for year ending June 30, 1908.

Bill of tax for year ending June 30, 1908.

Petition for revision and readjustment of tax for the year 1908, together with letter of D. W. McWilliams to Comptroller dated August 18, 1908.

Report of relator for year ending June 30, 1909.

Account of tax for year ending June 30, 1909.

Petition for revision and readjustment of tax for year 1909, together with letter of protest from J. H. Campbell to the Comptroller dated August 30, 1909.

Report of relator to Comptroller for year ending June 30, 1910.

Account of tax for year ending June 30, 1910.

Petition to Comptroller for revision and readjustment of the tax for the year ending June 30, 1910, together with letter of protest of J. H. Campbell to Comptroller dated August 30, 1910.

125 First determination of the Comptroller dated November 10, 1909 upon application for revision and readjustment of the taxes for three years, 1907, 1908 and 1909.

Second determination upon application for revision and readjustment for the taxes of three years, 1907, 1908 and 1909.

Determination upon application for revision and readjustment of tax for year ending June 30, 1910.

Certificate of incorporation of Interborough Rapid Transit Company.

Contract No. 1 and Contract No. 2. Testimony taken at hearing held at the State Comptroller's office, Albany, N. Y., October 19, 1909.

Undertaking on appeal and all other papers used on the hearing and considered by the Comptroller in this proceeding.

In witness whereof, I have hereunto set my hand and seal this 11th day of November, 1911.

WM. SOHMER,

Comptroller of the State of New York.

By F. A. WENDELL,

Deputy Comptroller.

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Notice of Filing Return.

SIR: Take notice that the within is a copy of return duly filed in the office of the Clerk of Albany County on the 11th day of November, 1911.

Yours, etc.,

THOMAS CARMODY,

Attorney General, Attorney for Respondent.

To James L. Quackenbush, Esq., Attorney for Relator.

127 *Testimony on Hearing, Attached as an Exhibit to Foregoing Return.*

STATE OF NEW YORK,

Comptroller's Office:

In the Matter of the Application of the INTERBOROUGH RAPID TRANSIT COMPANY for Revision and Readjustment of the Taxes Assessed Against it under the Provisions of Chapter 908 of the Laws of 1896 and the Acts Amendatory Thereof.

Hearing Held at the State Comptroller's Office, Albany N. Y., October 19, 1909, at 2 O'clock p. m., Before Hon. Otto Kelsey, Deputy Comptroller.

Appearances:

James L. Quackenbush, Esq., Attorney for the Company, and Ralph Norton, Esq., of Counsel.

John J. Merrill, Esq., Chief Corporation Tax Clerk, for the State Comptroller.

By Mr. MERRILL: Will you state your contention? It is entirely a legal proposition?

By Mr. NORTON: Yes: entirely. These are applications of the Interborough Rapid Transit Company for a revision and readjustment of the accounts stated by the Comptroller for each of three years ending June 30, 1907, June 30, 1908, and June 30, 1909. The tax was assessed by the Comptroller under Section 185 of the Tax Law upon the gross earnings of the company as reported. The taxes have been duly paid. The reports for each of the years in question sharply differentiate between the earnings of the Interborough Rapid Transit Company from the two divisions which it operates. These two divisions are, first, the elevated lines of the Manhattan Railway Company—

By Mr. MERRILL: Just a minute. This is just an argument?

By Mr. NORTON: It is a statement of the case.

By Mr. MERRILL: Well, the facts are all set forth in your applications?

By Mr. NORTON: Yes.

By Mr. MERRILL: Which are verified petitions in each case?

By Mr. NORTON: Yes. (Continuing statement) —and second, the lines of the Rapid Transit Railroad for the City of New York constructed in accordance with the provisions of the Rapid Transit Act of the State of New York, Chapter 4 of the Laws of 1891, and contracts between the City of New York and John B. McDonald and the Rapid Transit Subway Construction Company.

By DEPUTY COMPTROLLER: Known as the subway?

By Mr. NORTON: Yes. The Rapid Transit Act provided in Section 35 that the person, firm or corporation constructing and oper-

ating any railroad constructed under such act should be exempt from all taxation in respect to his, their or its interest in any such road.

The claim of the company is that the earnings of the subway division are not taxable under Section 185 of the Tax Law, and that, therefore, the percentage which has been stated in the accounts forwarded by the Comptroller for each of the years in question is illegal and without authority of law.

The same objection applies to the tax which has been assessed by the Comptroller upon excess dividends paid by the Interborough Rapid Transit Company, for the reason that for the first two years, June 30, 1907, and June 30, 1908, the portion of the earnings from the subway division, which were applicable to dividends and used in payment of dividends, reduced the total amount of dividends to less than four per cent. upon the issued capital stock of the Interborough Rapid Transit Company.

130 For the year ending June 30, 1909, the entire amount paid in dividends by the Interborough Rapid Transit Company represented earnings from the subway division, and, therefore, according to our contention, is clearly exempt under the statute.

With this brief statement of facts, I wish to introduce in evidence the following:

1. Certified copy of the certificate of incorporation of the Interborough Rapid Transit Company filed and recorded in the office of the Secretary of State on the sixth day of May, 1902.

Received in evidence and marked Petitioner's Exhibit No. 1.

2. A certified copy of Rapid Transit Contract No. 1 for the construction and operation of the Manhattan and The Bronx Rapid Transit Railroad in the City of New York, said contract being between the City of New York, acting by its Board of Rapid Transit Railroad Commissioners, and John B. McDonald. This volume also includes a certified copy of the assignment of the leasing or operating part of the contract from John B. McDonald to the Interborough Rapid Transit Company, dated July 10, 1902.

Received in evidence and marked Petitioner's Exhibit No. 2.

3. A certified copy of Rapid Transit Contract No. 2 for the construction and operation of the Brooklyn-Manhattan Rapid Transit Railroad in the City of New York, between the City of New York, acting by its Board of Rapid Transit Railroad Commissioners,

131 and the Rapid Transit Subway Construction Company; also a copy of the assignment of the leasing and operating part of said contract from the Rapid Transit Subway Construction Company to the Interborough Rapid Transit Company.

Received and marked Petitioner's Exhibit No. 3.

In connection with the application, I wish to call the Comptroller's attention to the phraseology of the exempting statute. The exemption is to the person, firm or corporation operating and the exemption extends to its interest in the railroad constructed thereunder. The word particularly is "interest." Now, I think that with the statute before you and with the decision of the Court of Appeals in the case brought by the Interborough Rapid Transit Company to review its special franchise tax assessment for the year 1905, and reported in 195 N. Y., 618, which upheld that property itself was

exempt from taxation, that there is absolutely no other construction that can be placed upon this statute.

The fact that it was intended that the company would be exempt from taxation from its entire interest in this railroad, and the further idea that the interest includes the earnings, has been upheld by no higher authority than the United States Supreme Court in the income tax case, involving the income tax of 1894, where it held that the taxation of earnings from real property was, in effect, a tax on the real property itself and extended that doctrine to a tax from the earnings on personal property.

132 Now, then, the interest which is specified by this statute can mean only the real property and personal property used as the equipment of the Rapid Transit Railroad Company and the income from these two elements. And, under the statute and the cases, I think it is incumbent upon the Comptroller to exempt this company and revise and readjust the tax for the three years in question in accordance therewith.

By Mr. MERRILL: Will you kindly furnish us with three copies of these exhibits?

By Mr. NORTON: I will.

Hearing closed.

133 PETITIONER'S EXHIBIT NO. 1, ATTACHED AS AN EXHIBIT TO FOREGOING RETURN.

Certificate of Incorporation of the Interborough Rapid Transit Company.

STATE OF NEW YORK,

County of New York, ss:

We, the undersigned, all of whom are of full age and at least two-thirds of whom are citizens of the United States, and more than one of whom are residents of this state, desiring to become a corporation under and in pursuance of Chapter 565 of the Laws of 1890, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 544 of the Laws of 1902, being an act entitled "An Act to amend Chapter four of the Laws of eighteen hundred and ninety-one, entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants,'" for the purpose of undertaking the construction and operation (including the equipment thereof), of the railway hereinafter described, and for the purpose of maintaining and operating a railroad already built not owned by a railroad corporation, viz., the railway already constructed or in process of construction under the contract made between the City of New York (acting by its Board of Rapid Transit Railroad Commissioners) and John B. McDonald, dated February 21, 1900, pursuant to the provisions of the said Chapter four of the Laws of eighteen hundred and ninety-one and amendments thereof, and the agreements amendatory to said contract, do hereby certify:

134 First. The name of the corporation shall be Interborough Rapid Transit Company.

Second. The duration of said corporation is to be perpetual.

Third. The kind of road to be built and operated is a rapid transit railway or railways for the conveyance and transportation of persons and property.

Fourth. The length and termini of the said roads are as follows:

One route or line is about fourteen miles in length. Its termini are (1) a point at or near the intersection of Broadway with Park Row in the Borough of Manhattan, City of New York, and (2) a point at or near the present Kingsbridge Station of the New York and Putnam Railroad, in the Borough of Bronx, City of New York. That said route or line is to be constructed under and over the following described route, viz., commencing at a point at or near the intersection of Broadway with Park Row, in the said Borough of Manhattan, City of New York; thence under Park Row and Centre street to a point at or near its intersection with New Elm Street, as proposed; thence under New Elm Street, as proposed, to Lafayette Place; thence under Lafayette Place to Eighth Street; thence across and under Eighth Street and thence under private property lying between Eighth and Ninth Streets and east of the westerly side or line of Lafayette Place, produced, to Fourth Avenue; thence under Fourth Avenue and Park Avenue to Forty-second Street; thence turning from Park Avenue into Forty-second Street, and taking for the purposes of the curve, if necessary or convenient, private property at the southwest corner of Park Avenue and Forty-second Street;

135 thence under Forty-second Street to Broadway; thence under Broadway to Fifty-ninth Street; thence under the Boulevard to a point at or near One Hundred and Twenty-fourth Street; thence by viaduct along and over the Boulevard to a point at or near One Hundred and Thirty-fourth Street; thence under the Boulevard and Eleventh Avenue to a point on the centre line of Eleventh Avenue, produced, one thousand one hundred and five feet north of the centre line of One Hundred and Nineteenth Street, running thence under and over Eleventh Avenue and private property to Naegle Avenue; thence along and over Naegle Avenue to Amsterdam Avenue; thence along and over Amsterdam Avenue to a point at or near its intersection with Kingsbridge Avenue or Broadway and south of Riverdale Avenue, thence over Kingsbridge Avenue to Riverdale Avenue, and thence easterly over Riverdale Avenue to a point within five hundred feet of the present Kingsbridge station of the New York and Putnam Railroad Company; including a loop at the City Hall Park which shall connect with the portion of the route aforesaid along Centre Street at or near the south end of that street, and thence proceed westerly and southerly under City Hall Park and Broadway, and thence easterly to again connect with the portion of the route aforesaid in Park Row. This route shall also include suitable tracks and connections from the City Hall loop to the post office, such tracks and connections being under the City Hall Park and under the portion of Park Row

between the south end of Centre Street and Ann Street. This route shall also include suitable tracks and connections from the
 136 portion of the route near the corner of Park Avenue and Forty-second Street to the yard and tracks of the Grand Central Station. All of the tracks and connections last mentioned shall be under Park Avenue and Forty-second Street and private property to be acquired.

The other route or line is about seven miles in length. Its termini are (1) a point of connection with the first above-described route on the Boulevard (or Broadway), in the Borough of Manhattan, City of New York, at or near its intersection with One Hundred and Third Street, and (2) a point at or near the intersection of Boston road with Bronx Park, in the Borough of the Bronx, City of New York.

The said route or line is to be constructed under and over the following described route, viz.: Beginning at a point of intersection with the first above-described line on the Boulevard or Broadway in the Borough of Manhattan, City of New York, between One Hundred and Third and One Hundred and Fourth Streets; thence under private property to a point in One Hundred and Fourth Street; thence under One Hundred and Fourth Street to and across Central Park West; thence under Central Park to the intersection of Lenox Avenue and One Hundred and Tenth Street; thence under Lenox Avenue to a point near One Hundred and Forty-second Street; thence curving to the east and passing under private property, One Hundred and Forty-third and One Hundred and Forty-Fourth Streets to the Harlem River at or near the foot of One Hundred and Forty-fifth Street; thence under the Harlem River and private

137 property to East One Hundred and Forty-ninth Street at or near its intersection with River Avenue; thence under East One Hundred and Forty-ninth Street to a point near its intersection with Third Avenue; thence with a curve to the left and under Third Avenue to a point near its intersection with Westchester Avenue; thence with a curve to the right to and under Westchester Avenue, and thence by viaduct over and along Westchester Avenue to the Southern Boulevard; thence over and along the Southern Boulevard to the Boston road, and thence over and along the Boston road to Bronx Park.

Also with a branch or spur extending from One Hundred and Forty-second Street under Lenox Avenue to One Hundred and Fiftieth Street.

The said above described railroad being the railroad constructed and in process of construction at the expense of the City of New York under contract made by and between said City of New York (acting by the Board of Rapid Transit Railroad Commissioners for said city), and John B. McDonald, dated February 21, 1900, and the agreements amendatory thereof.

Fifth. The said corporation shall also have power to enter into and fully perform any contract for the construction and operation of any other rapid transit railway authorized or which may be authorized to be constructed pursuant to the provisions of Chapter

four of the Laws of eighteen hundred and ninety-one, and its amendments and supplements.

Sixth. The name of each county in which any part of its roads are to be located are the counties of New York, Westchester, Richmond, Kings and Queens.

Seventh. The amount of the capital stock shall be twenty five million dollars (\$25,000,000).

Eighth. The number of shares into which the capital stock is to be divided is two hundred and fifty thousand (250,000), and the par value of each share is one hundred dollars (\$100). All of the said stock is to be common stock.

Ninth. The names and post office addresses of the directors of the corporation who shall manage its affairs for the first year are as follows:

Names.	Post-office addresses.
Wm. H. Baldwin, Jr.	New York City
Charles T. Barney	" " "
August Belmont	" " "
E. P. Bryan	Yonkers, N. Y.
Andrew Freedman	New York City
James Jourdan	" " "
Gardiner M. Lane	Boston, Mass.
John B. McDonald	New York City
Walter G. Oakman	" " "
John Peirce	" " "
William A. Read	" " "
Cornelius Vanderbilt	" " "
George W. Young	" " "

Tenth. As soon as practicable the directors shall divide themselves into classes, of which the first class shall consist of five directors, each of whom shall hold his office for one year, or until the first annual election; the second class shall consist of four other directors, each of whom shall hold office for two years, or until the second annual election; the third class shall consist of four other directors, each of whom shall hold office for three years, or until the third annual election; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the terms of one class of directors shall expire in each year. The board of directors may make by-laws to carry out this provision, which by-laws shall bind the members of the corporation.

Eleventh. The place where the principal office of the corporation is to be located is the Borough of Manhattan, City of New York.

Twelfth. The corporation shall have power to purchase, acquire, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor its own stock, bonds or other obligations.

Thirteenth. The board of directors, by an affirmative vote of a majority of the whole board, may annually appoint an executive

committee composed of seven of the directors, who shall continue as such committee for one year, and until their successors are appointed. The said executive committee shall have and may exercise any and all of the powers of the board of directors, except when the board is in session. Vacancies in said committee shall be filled by the board. A majority of said committee shall constitute a quorum for the transaction of business.

Fourteenth. The name and post-office address of each subscriber to this certificate, and the number of shares of stock in the corporation which he agrees to take, are as follows:

140

Names.	Post-office addresses.	Number of shares.
Wm. H. Baldwin, Jr.	New York City	10
Charles T. Barney	" " "	10
August Belmont	" " "	10
E. P. Bryan	Yonkers, N. Y.	10
Andrew Freedman	New York City	10
James Jourdan	" " "	10
Gardiner M. Lane	Boston, Mass.	10
John B. McDonald	New York City	10
De Lancey Nicoll	" " "	10
Walter G. Oakman	" " "	10
John Peirce	" " "	10
Wm. A. Read	" " "	10
Cornelius Vanderbilt	" " "	10
George W. Wickersham	" " "	10
George W. Young	" " "	10

In witness whereof, we have executed and acknowledged this certificate in duplicate, and have hereunto subscribed our names at the City of New York this 25th day of April, one thousand nine hundred and two.

WM. H. BALDWIN, JR.
 GARDINER M. LANE.
 JAMES JOURDAN.
 C. T. BARNEY.
 ANDREW FREEDMAN.
 AUGUST BELMONT.
 JOHN PEIRCE.
 E. P. BRYAN.
 JOHN B. McDONALD.
 WALTER G. OAKMAN.
 G. W. YOUNG.
 WM. A. READ.
 CORNELIUS VANDERBILT.
 DE LANCEY NICOLL.
 GEO. W. WICKERSHAM.

141 STATE OF NEW YORK,
County of New York, ss:

On the 25th day of April, 1902, before me personally appeared August Belmont, De Lancey Nicoll, Walter G. Oakman, William A. Read, George W. Wickersham, George W. Young and E. P. Bryan and on the 28th day of April, in the year last aforesaid, also before me personally came John Peirce, John B. McDonald, Andrew Freedman, Cornelius Vanderbilt, Charles T. Barney and James Jourdan and on this fifth day of May, in the year last aforesaid, also before me personally came William H. Baldwin, Jr., each to me known and known to me to be one of the individuals described in, and who executed the foregoing instrument, and each of whom to me severally acknowledged that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at the City of New York the day and year last above written.

[SEAL.]

A. W. ANDREWS (36),
Notary Public, N. Y. Co.

142 STATE OF MASSACHUSETTS,
County of Suffolk, ss:

I, Charles Hall Adams, a Commissioner of the State of New York residing in Boston, in the County of Suffolk and State of Massachusetts, do certify that on this third day of May, 1902, before me personally appeared, in the City of Boston, aforesaid Gardiner M. Lane, to me known, and known to me to be one of the individuals described in and who executed the foregoing instrument, and who to me acknowledged that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at the City of Boston the day and year aforesaid.

[SEAL.]

CHAS. HALL ADAMS,
Commissioner of the State of New York.

STATE OF NEW YORK,
County of New York, ss:

August Belmont, Walter G. Oakman and E. P. Bryan, being severally duly sworn, each for himself, deposes and says: That he is a director named in the foregoing certificate of incorporation; that at least one thousand dollars of capital stock for every mile of road built or proposed to be built has been subscribed hereto, and has been paid in good faith and in cash to the directors named in the certificate, and that it is intended in good faith to build, maintain and operate the roads mentioned therein.

AUGUST BELMONT.
WALTER G. OAKMAN.
E. P. BRYAN.

Severally subscribed and sworn to before me this 25th day of April, 1902.

[SEAL.]

A. W. ANDREWS,
Notary Public (36), N. Y. Co.

143 This is to certify that, pursuant to the authority upon it conferred by Chapter four of the laws of eighteen hundred and ninety-one, as amended by Chapter 544 of the laws of nineteen hundred and two, the Board of Rapid Transit Railroad Commissioners, appointed in and for the City of New York, has, by a resolution duly adopted at a meeting held on the first day of May, 1902, approved, and does hereby approve, the Interborough Rapid Transit Company, the certificate of incorporation of which is hereunto annexed.

In witness whereof, the said Board of Rapid Transit Railroad Commissioners has caused this certificate to be duly executed in duplicate by its president and secretary, under its official seal, this first day of May, 1902.

THE BOARD OF RAPID TRANSIT
RAILROAD COMMISSIONERS IN
AND FOR THE CITY OF NEW
YORK,

By A. E. ORR, *President.*

Attest:

[SEAL.] BION L. BURROWS, *Secretary.*

At a meeting of the Board of Rapid Transit Railroad Commissioners in and for the City of New York, duly held on the first day of May, 1902, the following resolution was duly adopted, viz:

144 "Resolved, that pursuant to the authority upon it conferred by Chapter 4 of the laws of 1891, as amended by Chapter 544 of the laws of 1902, this Board does hereby approve the Interborough Rapid Transit Company, a certificate for the incorporation whereof has been submitted to this meeting, and the president and secretary of this Board are hereby authorized and directed to make and execute, under the seal of this Board, the certificate of approval of said corporation provided for in Section 34 of the said act as so amended, in the form submitted to this meeting, and that a copy of said certificate of incorporation, and of said certificate of approval, be spread upon the minutes of this meeting."

And I do further certify that a true copy of the certificate of incorporation of Interborough Rapid Transit Company hereto annexed was submitted to and approved by said Board at said meeting, and that the certificate of approval authorized by said meeting is in the same form as the certificate of approval hereto attached.

In witness whereof, I have hereunto subscribed my name and affixed the official seal of the said Board this first day of May, 1902.

[SEAL.]

BION L. BURROWS,

*Secretary the Board of Rapid Transit Railroad
Commissioners in and for the City of New York.*

145 Indorsed: Certificate, of Incorporation of Interborough Rapid Transit Company. Tax for privilege of organization of this corporation. \$12,500.00/100. Under Chapter 448, Laws of 1901. Paid to State Treasurer before Filing. State of New York, Office of Secretary of State. Filed and recorded May 6, 1902. J. B. H. Mongin, Deputy Secretary of State.

STATE OF NEW YORK,
Office of Secretary of State:

I have compared the preceding with the original certificate of incorporation of Interborough Rapid Transit Company, filed and recorded in this office on the 6th day of May, 1902, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and seal of office of the Secretary of State, at the City of Albany, this 22d day of December, one thousand nine hundred and six.

[L. S.]

FRANK D. COLE,
Deputy Secretary of State.

146 *Stipulation as to Petitioner's Exhibits 2 and 3.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY, Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York, Defendant.

It is hereby stipulated and agreed that Exhibits Nos. 2 and 3 introduced in evidence at the hearing before the State Comptroller, enumerated in the return to the writ herein, and which are Rapid Transit Contracts Nos. 1 and 2 respectively, being the contracts for the construction, operation and equipment of the rapid transit railroad in the City of New York, together with the assignments from the individual contractors to the Interborough Rapid Transit Company, need not be printed in the record in this proceeding, but that copies of such exhibits may be presented to the judges presiding at any argument which may be had upon the issues raised by the writ of certiorari and return herein, with the same effect as if the said exhibits were printed in full. And it is

147 Further stipulated that the various papers and exhibits attached to the return herein, which are included as exhibit in the petition of the Relator for a writ of certiorari, may be omitted after the return, sufficient and appropriate reference being made to the omitted papers and exhibits so that they may be readily found in the printed record.

Dated November 14, 1911.

JAMES L. QUACKENBUSH,
Attorney for Relator.

THOMAS CARMODY,
Attorney General, Attorney for Defendant.

The other exhibits attached to the return, all being hereinbefore set forth as exhibits of the petition, are under the foregoing stipulation, omitted at this point; said exhibits being as follows:

1. Report of relator for the year ending June 30, 1907.
(See page 36 of this record.)
2. Account of tax for year ending June 30, 1907.
(See page 42 of this record.)
3. Petition to Comptroller for revision and readjustment of tax for the year 1907.
(See page 32 of this record.)
4. Letter of protest from D. W. McWilliams to Hon. Martin H. Glynn, dated October 31, 1907.
(See page 40 of this record.)
5. Report of company for year ending June 30, 1908.
(See page 49 of this record.)
6. Bill of tax for year ending June 30, 1908.
148 (See page 56 of this record.)
7. Petition for revision and readjustment of tax for year 1908.
(See page 44 of this record.)
8. Letter of D. W. McWilliams to Comptroller, dated August 18, 1908.
(See page 53 of this record.)
9. Report of relator for year ending June 30, 1909.
(See page 62 of this record.)
10. Account of tax for year ending June 30, 1909.
(See page 69 of this record.)
11. Petition for revision and readjustment of tax for year 1909.
(See page 57 of this record.)
12. Letter of protest from J. H. Campbell, to Comptroller, dated August 30, 1909.
(See page 66 of this record.)
13. Report of relator for year ending June 30, 1910.
(See page 76 of this record.)
14. Account of tax for year ending June 30, 1910.
(See page 83 of this record.)
15. Petition to Comptroller for revision and readjustment of the tax for the year ending Jun 30, 1910.
(See page 71 of this record.)
16. Letter of protest from J. H. Campbell to Comptroller, dated August 30, 1910.
(See page 80 of this record.)
17. First determination of the Comptroller, dated November 10, 1909, upon applications for revision and readjustment of the taxes for three years, 1907, 1908 and 1909.
(See page 70 of this record.)
18. Second determination upon application for revision
149 and readjustment for the taxes of three years 1907, 1908 and 1909.
(See page 84 of this record.)
19. Determination upon application for revision and readjustment of tax for year ending June 30, 1910.

(See page 87 of this record.)

20. Undertaking.

(See page 89 of this record.)

Waiver of Certification.

It is hereby stipulated, that the foregoing printed *papers* contain true copies of all the papers in the above-entitled proceeding, and certification thereof, in pursuance of Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York, February 9, 1912.

JAMES L. QUACKENBUSH,

Attorney for Relator.

THOMAS CARMODY,

Attorney General, Attorney for Respondent.

150 *Opinion of the Court of Appeals in "People ex Rel. Interborough R. T. Co. vs. Williams, Comptroller."*

Reported, 200 N. Y., 93.

Cross-appeals from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 23, 1910, which confirmed in part and reversed in part a determination of the defendant in assessing franchise taxes against the Relator under Section 185 of the Tax Law for the years ending June 30, 1907, 1908 and 1909, respectively. Said Comptroller held that for the privilege of exercising its corporate franchise in operating an elevated street railroad under lease the relator should pay an annual tax of one per cent. upon the gross earnings derived not only from the operation of said road but also from the operation of its independent subway railroad and also three per cent. upon the amount of dividends declared or paid in excess of four per cent. upon the actual amount of paid-up capital employed by such corporation in the operation of said subway road as well as, if any, in the operation of said elevated railway. The gross receipts from the operation of each road amounted to several million dollars each year and there is no opposition by relator to the imposition of the tax upon the gross receipts derived from the operation of the elevated road.

151 The Appellate Division affirmed the former part of the Comptroller's determination, but overruled the latter part relating to tax on dividends.

Under the so-called Rapid Transit Act, Chapter 4, Laws of 1891, the City of New York entered into what were known as rapid transit contracts No. 1 and No. 2, respectively, with one McDonald and the Rapid Transit Subway Construction Company, for the construction, equipment and operation of a subway railroad in the Boroughs of Manhattan and Brooklyn. The relator was organized under the provisions of the Railroad Law and of said Rapid Transit Act and its certificate of incorporation provided that it should have the power to undertake the construction, equipment, operation and maintenance of the railroad then constructed and in process of con-

struction under the McDonald contract and also the power to enter into and perform any contract for the construction and operation of any other rapid transit railway authorized or which might be authorized to be constructed under the provisions of said Rapid Transit Act.

Thereafter said relator acquired the right and assumed the duty of equipping and operating the subway railroad constructed under the two contracts hereinbefore referred to under assignments or agreements dated June 10, 1902, and August 10, 1905. In addition to this, on or about April 1, 1903, it made a lease with the Manhattan Railroad Company whereby it undertook the operation of various elevated railroads in the Boroughs of Manhattan and the Bronx, owned or controlled by said company, and during all of the years involved in this controversy it was engaged in operating both subway railroads and elevated railroads under the contracts and leases referred to.

James L. Quackenbush, Richard Reid Rogers and Ralph Norton, for Relator, Appellant and Respondent.

Edward R. O'Malley, Attorney-General (Edward H. Letchworth, of Counsel), for Defendant, Respondent and Appellant.

HISCOCK, J.:

Originally the relator alone complained of the assessment made by the comptroller of the franchise tax against it. On appeal to the Appellate Division this determination was in part affirmed and in part reversed, with the result that each side now appeals.

The relator is engaged in the operation in the Boroughs of Manhattan and the Bronx of both subway and elevated street railroad systems, which are assumed to be distinct from one another.

Section 185 of the Tax Law provides as follows: "Franchise tax on elevated railroads or surface railroads not operated by steam.—Every corporation, joint stock company or association owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the State for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this State, an annual tax which shall be one per centum upon its gross earnings from all sources within this State, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock." (Cons. Laws, ch. 60).

The Comptroller took the view that under this statute the relator, because of its operation as lessee of the elevated railroads, should be assessed in an amount of one per cent. not only on its gross earnings derived from the operation of said roads, but also upon its gross earnings derived from the operation of its subway

roads, and three per cent upon the amount of dividends declared in excess of four per cent upon all of its paid-up capital employed in the equipment and operation of said latter roads, and the Appellate Division sustained him as to the tax on gross receipts. We have been unable to agree in full with the contention of either party on the appeal, and, therefore, we shall be compelled to consider these views singly rather than in any general classification.

The relator in the first instance urges that it is expressly exempted from the imposition of any tax whatever on its franchise as employed or enjoyed in the operation of the subway roads. This claim is based on the provisions of Section 35 of the Rapid Transit Act, Chapter 4, Laws of 1891, as modified in subsequent years, and which section provides as follows: "The equipment to be supplied by the person, firm or corporation operating any such (subway) road, shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, 154 and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road." (L. 1900, ch. 616).

We do not believe that this provision is broad enough to sustain relator's claim and exempt it from the payment of any franchise tax in its subway operations. The preceding sections of the Rapid Transit Act provided in detail for the construction, equipment and operation of subway roads, and for the execution of a contract with such person, firm or corporation as in the opinion of the Board of Rapid Transit Commissioners should be best qualified to carry out the contracts to be made. They likewise provided for the payment of rentals by the contracting party, and in effect for an assignment of contracts entered into under the authority of the act with the written consent of such commissioners. These provisions thus very completely covered the execution of contracts for the construction and operation of said roads, and fixed the benefits and obligations to be derived from and incurred under such contracts. The legislature then enacted the provision in question whereby "the person, firm or corporation" operating such roads should be exempt from taxation in respect to his, their or its "interest under said contract" and in respect to rolling stock and equipment. It seems very clear to us that this exemption covered just what is 155 plainly implied by the natural meaning of the language, namely, the interest acquired and property used under and in carrying out the contracts for the equipment and operation of the road, and that it did not extend beyond that.

Two steps were necessary before the relator could enter upon the equipment and operation of the railroad. The first of these was its creation through incorporation, and the second was the procuring

and execution of the contracts for equipment and operation, with resulting rights and obligations thereunder. While doubtless the first was taken with express reference to the second the two were entirely separable and distinct, and there was no difficulty if the legislature saw fit in exempting relator from taxation "in respect to * * * its interest under said contract and in respect to the rolling stock and all other equipment of said road" without exempting it from taxation, because of privileges and advantages which it enjoyed through corporate existence in securing and carrying out the contracts under which it enjoyed the "interest" mentioned, and this is what it did.

Counsel has vigorously contended that the importance and difficulties of the rapid transit situation in New York and the desirability of effecting some such arrangement as was secured by relator's incorporation required substantial inducements, and that the spirit of the situation makes present assessment of the relator on its franchise a breach of good faith if not an impairment of contractual rights we should avoid by broad interpretation of the statute. While we are unable to find in the language of the statute a requirement as claimed by relator's counsel that the equipment and operation of the road must be undertaken by a corporation, still if we concede for present purposes that the general argument of counsel for exemption has force it was one to be addressed to the legislature, and it is possible that if the present statutes providing for assessments of franchises had been fully foreseen and considered the exemption clause would have been made broader. But however this may be, and whatever the cause may have been, the language of the statute which actually was passed by the legislature is not broad enough under any proper rules of interpretation fairly to include the exemption now claimed, and this being so we cannot substitute what would be equivalent to an amendment for judicial construction.

While it is not desirable to review at length and in detail the authorities cited in behalf of the relator, it may be stated generally that they do not sustain his position under the language of this statute, and this statement will be fortified by brief analysis of the leading authorities cited on this point.

In *Wilmington R. R. v. Reid* (13 Wall., 264), the Court had before it for construction a statute providing that "the property of said company (plaintiff in error) and the shares therein shall be exempt from any public charge or tax whatsoever." Here was a statute broadly exempting all of the property of the company from taxation, and the only question was whether a tax on the franchise of the corporation was a violation of this statute. The Court held that nothing was better settled than that the franchise of a private corporation was property, and this being so, of course it was exempt.

157 In *Gulf & S. I. R. R. Co. v. Hewes* (183 U. S., 66), the charter of the plaintiff railroad company declared "that said company, its stock, its railroads, and appurtenances and all its property in this State, necessary or incident to the full exercise of

all powers herein granted, shall be exempt from taxation," Again, the only question was whether a privilege tax was a tax on the property of said company and, therefore, a violation of the statute and it was again held that a franchise was property and that, therefore, the proposed tax was invalid.

In *Wright, Comptroller, etc. v. Georgia R. R. & Banking Co.* (216 U. S., 420), the Court was called on to interpret a statute providing that "The stock of the said company * * * shall be exempt from taxation for and during the term of seven years" (P. 422). It was held that the capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company while the shares are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company, and further that the stock exempted in this case was the capital or property of the corporation; that a law which sought to impose a tax on the franchise of a railroad company whose property is exempt from taxation was a violation of the exemption contract.

It will thus be seen that each one of these cases dealt with the construction of a law granting a general exemption to a corporation of its property from taxation and the question was whether the franchise was property within the meaning of the statute before the

Court for interpretation.

158 In this respect the facts in each case differed from those of the present one where the exemption by its terms extended only to the interest under a given contract and certain specified property.

But holding that there is no such general exemption as is claimed by relator we are nevertheless unable to agree with the views adopted by the Comptroller and the Appellate Division that the relator because operating an elevated road under a lease was subject under Section 185 of the Tax Law to a franchise assessment measured by a percentage on the gross receipts from its subway as well as on those from the elevated road.

This contention and decision has been based upon a literal interpretation of the statute that every corporation operating an elevated railroad shall pay for the privilege of exercising its corporate franchise an annual tax which shall be one per centum upon its gross earnings "from all sources within this state," etc., and, of course, such literal interpretation would support the conclusion which has been reached. We do not think, however, that such interpretation is justifiable under the circumstances of this case.

On the facts set forth in the preliminary statement and appearing in the record we think that fairly it must be stated that the primary and controlling purpose which led to the incorporation of relator was that of equipping and operating the subway roads the being and thereafter constructed in the city of New York. Other facilities for the transportation of passengers, including the elevated railroads, were already in existence when it was organized, and its organization entered into the general scheme which was then be-

159 ing perfected of adding subway roads as an important factor in solving the difficult question of transportation facilities which for a long time had perplexed the city of New York. If this assumption and statement be correct, then it quite naturally follows that the lease by relator of the Manhattan elevated railroads was in a certain sense an incidental and secondary step undertaken by it doubtless for the purpose of supplementing the operation of the subway roads and making more perfect and satisfactory the accommodations which it would be able to offer to the traveling public. It is stated without substantial dispute that relator's capital of thirty-five millions of dollars is wholly invested in the equipment and operation of the subway roads for which it was organized, and its gross receipts exclusively from the operation of said roads and by a percentage upon which it is proposed to increase the tax upon the franchise enjoyed in the operation of the elevated railroads, aggregate many million dollars each year.

It seems apparent that there is no particular propriety or justice in compelling a corporation utilizing its corporate franchise to operate an elevated road, aimed at by the statute, to pay as a tax for such enjoyment a percentage not only on its receipts derived from such employment of its franchise but also on its receipts derived from the employment of its franchise in carrying on an entirely distinct and different business, and in respect whereof it is not otherwise subject to assessment under this section. The application of such a rule even to the facts of this case would produce results which we cannot believe to have been anticipated at the enactment of the statute, and it is easy to imagine how the rule might produce

160 even more inequitable results than would appear here. A corporation operating very many miles of railroad not elevated might be compelled or deem it advisable to construct a fraction of a mile of elevated road at a terminal or leading to a pleasure resort, and thus on this interpretation become subject to an assessment as the operator of an elevated road measured by its receipts from its entire main road, although the proportion of elevated road to the main road was so insignificant as to render such a result absurd and grossly unjust.

We do not think that the words "from all sources," used in describing the gross receipts made the basis for fixing the amount of the assessment, have a meaning so unqualified and inflexible under all circumstances as the comptroller and the court below have given them. They should be so interpreted as to carry out what must have been the intention of the legislature. It was doubtless assumed, and ordinarily would be the case that a corporation operating an elevated road would not be engaged in operating another road of equal or perhaps superior importance, and that whatever other projects it carried on would be of minor importance and incidental to and largely comprehended within the scope of its principal undertaking as the operator of an elevated road. In such a case it would not be at all unreasonable to make it pay a tax for the exercise of its franchise in carrying on its primary and important undertaking

which included a percentage on its receipts from these secondary and minor sources which were more or less the results of and dependent on its main enterprise. But we think that the intent and enactment of the legislature should be regarded as limited by some such just and pertinent boundary as this, and that it was not the purpose to make the statute so all comprehensive as to include the receipts from the employment of the franchise in way which could in no sense be viewed as merely incidental to or a result of the operation of the elevated road.

It is also insisted in behalf of the Comptroller with perfect consistency that under the dividend clause of the section in question which provides that the franchise tax shall include a tax of three per cent. upon the amount of dividends declared or paid in excess of four per cent. upon "the actual amount of paid-up capital employed," the relator because operating an elevated road must pay the tax in question upon all dividends in excess of four per cent. declared on its capital exclusively devoted to the equipment, maintenance and operation of the subway road. We think on the other hand that reasons analogous to those already set forth in the discussion of the prior provisions of the statute lead to a different conclusion and that was the view adopted by the Appellate Division on this question. The language used in this clause of the statute is, it must be conceded, somewhat ambiguous and uncertain, and it is perhaps more difficult to apply it satisfactorily to the facts disclosed on this appeal. But without repeating at length reasons already stated it does not seem to us that because of its operation of an elevated railroad the relator should be assessed for dividends declared upon its capital invested in the subway roads, and it is claimed on this argument that all of its capital is so invested and utilized.

162 it should be established that a portion of its paid-up capital was employed in the operation of the elevated road the would seem to be some propriety in making dividends of that kind described, declared upon such capital so employed subject to the tax in question.

The views which have thus been expressed do not in our judgment lead to the final conclusion that relator, although not assessable in respect to its subway roads under Section 185 of the Tax Law, do not come within any of the provisions of the law relating to the assessment of a franchise tax. While that specific question has not been fully discussed on this appeal and, therefore, perhaps should be regarded as subject to further consideration if necessary, we see no reason to doubt that within Sections 182 and 184 of the Tax Law are provisions broad enough to provide for a franchise tax against the relator in respect of its equipment, maintenance and operation of the subway roads.

The order of the Appellate Division should be reversed and the determination of the Comptroller annulled, with costs to relator both Courts and a new assessment ordered.

Cullen, Ch. J., Haight, Vann, Werner, Willard Bartlett and Chase, JJ., concur.

Order reversed, etc.

1621½ STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York do hereby certify that I have compared the annexed copy of opinion in the case of *People ex Rel., Interborough R. T. Co. v. Williams*, as Comptroller &c., decided by the Court of Appeals on the 29th day of November, 1910, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 24th day of February, 1913.

[Seal Court of Appeals, State of New York.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals
of the State of New York.

Attest:

[L. S.]

R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of *People ex. Rel., Interborough R. T. Co. v. Williams*, as Comptroller &c., decided by the said Court of Appeals on the 29th day of November, 1910, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 24th day of February in the year of one thousand nine hundred and thirteen.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals
of the State of New York.

163

Notice of Appeal to Court of Appeals.

Appellate Division of the Supreme Court, Third Department

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
 TERBOROUGH RAPID TRANSIT COMPANY, Relator-Appellant,
 against

WILLIAM SOHMER, as Comptroller of the State of New York, De-
 fendant-Respondent.

You will please take notice that the above-named relator hereby
 appeals to the Court of Appeals of the State of New York, from the
 order entered herein in the office of the Clerk of the Appellate
 Division of the Supreme Court, Third Department, on the 13th
 day of May, 1912, as resettled by the order entered herein in the
 office of the Clerk of the Appellate Division of the Supreme Court,
 Third Department, on the 24th day of May, 1912, which order
 unanimously confirmed the respective determinations of the Com-
 ptroller of the State of New York herein; and said relator ap-
 164 peals from each and every part of said order.

Dated, New York, June 21, 1912.

Yours, etc.,

JAMES L. QUACKENBUSH,

Attorney for Relator-Appellant, No. 165

Broadway, Borough of Manhattan,

New York City.

To Thomas Carmody, Esq., Attorney General, Attorney for De-
 fendant-Respondent and William J. Grattan, Esq., Clerk of Albany
 County.

165 *Resettled Order of Appellate Division Confirming Com-
 ptroller's Determinations.*

At a Term of the Appellate Division of the Third Department
 Held at the Appellate Division Court Rooms, in the City of
 Albany, Commencing on the 7th Day of May, 1912.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.

" John M. Kellogg,

" James A. Betts,

" James W. Houghton,

" George F. Lyon,

Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY, Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant.

Upon reading and filing the relator's notice of motion, dated May 18, 1912, and the admission of due and timely service thereof by the attorney for the defendant, together with the affidavit of Ralph Norton, verified the 18th day of May, 1912, and upon the 166 annexed consent of the attorneys for the parties hereto, it is
Upon motion of James L. Quackenbush, Esq., attorney for the relator,

Ordered that the order confirming the determinations reviewed heretofore entered herein in the office of the Clerk of the Appellate Division, Third Department, on the 13th day of May, 1912, be, and the same is hereby resettled so as to read as follows:

"At a Term of the Appellate Division of the Third Department Held at the Appellate Division Court Rooms, in the City of Albany, Commencing on the 5th Day of March, 1912.

Present:

Hon. Walter Lloyd Smith, Presiding Justice.
" John M. Kellogg,
" James A. Betts,
" James W. Houghton,
" George F. Lyon,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of
INTERBOROUGH RAPID TRANSIT COMPANY
against
WILLIAM SOHMER, as Comptroller of the State of New York.

A writ of certiorari having been issued out of the Supreme Court, Albany County, in the above-entitled proceeding to review 167 the two separate determinations of the Comptroller of the State of New York, each dated August 15, 1911, wherein and whereby the said State Comptroller purported to revise and readjust the accounts previously audited and stated for corporate franchise taxes against the relator for the years ending June 30, 1907; June 30, 1908; June 30, 1909 and June 30, 1910, respectively, and the Comptroller herein having filed his return to such writ in the office of the Clerk of the County of Albany, on the 11th day of November, 1911, and the said proceeding having duly come on to be heard at this Term of Court, and after hearing Ralph Norton, Esq., of counsel for the relator, Franklin Kennedy, Esq., of counsel for the respondent, and due deliberation having been had,
Upon motion of Thomas Carmody, Esq., Attorney General, it is

Ordered, that the respective determinations of the Comptroller of the State of New York reviewed herein be unanimously confirmed, with Fifty (\$50) dollars costs, and disbursements, upon the authority of 'People ex Rel. Interborough Rapid Transit Company v. Williams' (200 N. Y., 93).

JOSEPH H. HOLLAND, *Clerk*.

A copy.

[L. S.] JOSEPH H. HOLLAND, *Clerk*.

168

Affidavit of No Opinion.

STATE OF NEW YORK,

County of New York, ss:

Frank D. Allen, being duly sworn, deposes and says: That he is an attorney and counsellor-at-law in the office of the attorney for the relator herein; that no opinion was made or delivered by the Justices of the Appellate Division for the Third Department at the time of making their decision in this proceeding other than the statement that the Comptroller's determinations were confirmed "upon the authority of same relator against Williams, 200 N. Y., 93."

FRANK D. ALLEN.

Sworn to before me this 22nd day of November, 1912.

JOHN J. WATERS,

Notary Public, New York County, No. 174.

Certificate filed in Register's office, New York County, No. 3116.

[Notarial Seal.]

169

Stipulation Waiving Certification.

It is hereby stipulated that the foregoing printed papers contain true copies of the resettled order of confirmation by the Appellate Division and of the notice of appeal therefrom and of all other papers in this proceeding, and certification thereof, as required by Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, November 26th, 1912.

JAMES L. QUACKENBUSH,

Attorney for Relator.

THOMAS CARMODY,

Attorney General, Attorney for Respondent.

STATE OF NEW YORK,

County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Remittitur with the original thereof, filed in this office on the 24 day

of Jan., 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of March, 1913.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN, *Clerk.*

170 *Final Order of the New York Supreme Court, Entered in the Foregoing Remittitur.*

At a Special Term of the Supreme Court Held in and for the County of Albany, in the Court Rooms, in the County Building at the City of Albany, N. Y., on the 24th Day of January, 1913.

Present, Hon. William P. Rudd, Justice Presiding.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the
INTERBOROUGH RAPID TRANSIT COMPANY, Plaintiffs,

VS.

WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant.

The above named relator, having appealed to the Court of Appeals of the State of New York from the final order entered and filed in the office of the clerk of the Appellate Division, Third Department, on the 13th day of May, 1912, as resettled by the order entered herein in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department on the 24th day of May, 1912, which order unanimously confirmed the determinations of the Comptroller of the State of New York dated August 15th, 1911, wherein and whereby the State Comptroller revised and readjusted the accounts previously audited and stated of franchise taxes against the relator for the years ending June 30, 1907, June 30, 1908, June 30, 1909 and June 30, 1910; and said appeal having been duly argued in the Court of Appeals; and after due deliberation the Court of Appeals having ordered and adjudged

171 that the said order so appealed from as aforesaid be affirmed with costs; and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the Court of Appeals herein and upon motion of Thomas Carmody, Attorney-General, it is

Ordered, that the said Order and Judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

WM. P. RUDD,

Justice of the Supreme Court.

Enter.

STATE OF NEW YORK,

County of Albany, Clerk's Office, ss:

I, William J. Grattan, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, Do Hereby Certify that I have compared the annexed copy Order with the original thereof, filed in this office on the 24 day of Jan., 1913, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 7 day of Mar., 1913.

[Seal Albany County, July, 1847.]

WM. J. GRATTAN, *Clerk.*

172 [Endorsed:] Supreme Court, Albany County. The People of the State of New York ex Rel. Interborough Rapid Transit Co., Plaintiffs, vs. William Sohmer, Comptroller, Defendant. (Copy.) Order making Order of Court of Appeals the Order of the Supreme Court. Thomas Carmody, Attorney-General, Capitol, Albany, N. Y.

SIR: Take notice that the within is a copy of an order duly filed and entered in the office of the Clerk of Albany County, on the 24th day of January, 1913.

Yours, etc.,

THOMAS CARMODY,
Attorney-General,
Attorney for Defendant.

To James L. Quackenbush, Esq., Attorney for Plaintiff.

173 *Opinion of the Court of Appeals.*

PEOPLE OF THE STATE OF NEW YORK ex Rel. INTERBOROUGH RAPID TRANSIT COMPANY, Appellant,

v.

WILLIAM SOHMER, as Comptroller of the State of New York, Respondent.

(Decided January 21, 1913.)

Appeal from an order of the Appellate Division in the third department, confirming, in certiorari proceedings, the determination of the comptroller in assessing a franchise tax upon the relator.

Ralph Norton for Appellant.

Thomas Carmody, Attorney-General (Franklin Kennedy of counsel), for Respondent.

WERNER, J.:

This appeal is, in effect, a supplement to a similar appeal brought to this court by the same relator in 1910 against the then comptroller

of the State of New York. (People ex Rel. Interborough R. T. Co. v. Williams, 200 N. Y. 93.) The opinion in the former proceeding sets forth in detail the history of the so-called rapid transit legislation and contracts, with a statement of the rights and obligations which the relator acquired and assumed under them. There the record disclosed that the relator was engaged in operating, as lessee, the elevated railroad system in New York City, as well as the subway system referred to in the rapid transit contracts. The comptroller levied a tax for the years 1907, 1908 and 1909 upon the gross earnings which the relator derived from both systems, and upon the dividends in excess of four per centum, and he sought to justify the tax under the provisions of section one hundred and eighty-five of the Tax Law (Cons. Laws, Ch. 60), which provides that "every corporation * * * owning or operating any elevated railroad or surface railroad not operated by steam, shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation * * *." The comptroller decided that this section of the Tax Law (185) authorized the imposition of a tax, at the rate named, in respect of the subways as well as the elevated road. This was held to be error. We decided that, under the provisions of section 185 the relator was taxable only in respect of its operation of the elevated road. This conclusion, which was based upon our construction of the above-quoted provisions of section 185, necessarily involves the construction of section 183 of the Tax Law, under which the relator claims exemption from taxation

in respect to the operation of its subways. That section, so far
 174 as material, provides that "corporations * * * owning or operating elevated railroads or surface railroads not operated by steam * * *, and liable to a tax under sections one hundred and eighty-five and one hundred and eighty-six of this chapter, shall be exempt from the payment of taxes prescribed by section one hundred and eighty-two of this chapter." We hold that this exemption does not apply to the subways, but only to the elevated road in respect of which a tax has been levied under section one hundred and eighty-five.

The questions necessarily decided and involved in the former appeal (200 N. Y. 93) were, therefore, as follows: First. That the relator is not entitled to total exemption from taxation by reason of the provisions of section thirty-five of the Rapid Transit Act (L. 1894, Chapter 752, Sec. 35) for the reasons stated in our former opinion. Second. Under section one hundred and eighty-five of the Tax Law, the relator is liable to a franchise tax only upon its elevated road and not upon its subways. Third. Under the provisions of section one hundred and eighty-three of the Tax Law, the relator was not entitled to exemption from franchise taxation in respect of its subways, but only in respect of its elevated road, as to which it is taxable under the provisions of section one hundred and eighty-five of the Tax Law.

In addition to what was actually decided and directly involved on the former appeal, the court expressed the view that the relator, although not taxable in respect of the subways under section one hundred and eighty-five, is taxable for the right to be a corporation and to exercise its corporate franchise under sections one hundred and eighty-two and one hundred and eighty-four.

The matter is now again before us on an appeal from the comptroller's revision of the taxes levied under all these sections. To the extent of the tax under section one hundred and eighty-five, relating to the franchises connected with the elevated road, there is now no complaint by either party. As to amount of the taxes levied under sections one hundred and eighty-two and one hundred and eighty-four there is no question, if there is any right to levy a tax under them, but the relator asserts that, having paid its tax under section one hundred and eighty-five, it is wholly exempt from all other franchise taxation.

We think there is no room for doubt as to the meaning and effect of the sections one hundred and eighty-two and one hundred and eighty-four. These sections are broad enough to authorize the tax which the comptroller has now levied upon the relator's right to operate the subways as a corporation. Section one hundred and eighty-two provides that "For the privilege of doing business or exercising its corporate franchises in this state, every corporation, * * * doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount." Then follows a statement of the method by which the amount shall be measured. The quoted language of this section is unmistakably plain and comprehensive. It includes "every corporation" doing business within the state, and distinctly declares that it is a tax "for the privilege of doing business or exercising corporate franchises in this state." Equally plain is the language of section one hundred and eighty-four, under which the comptroller has levied an additional franchise tax upon the relator in respect of its subway system. That section is entitled "Additional franchise tax on transportation and transmission corporations." It provides that "Every corporation * * * formed for steam surface railroad * * * and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay * * * an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state," etc. This is an additional franchise tax in the nature of a license fee, which is imposed only upon transportation corporations as distinguished from general corporations, and we so held in *People ex Rel. Cornell Steamboat Co. v. Sohmer* (206 N. Y. 651.)

The order of the Appellate Division confirming the determination of the comptroller should be affirmed, with costs.

CULLEN, Ch. J.:

I concur in the opinion of Judge Werner. So far as it is contended that the relator is exempt from taxation with respect to its subway operations, by virtue of section 35 of the Rapid Transit Act, the point is the same as that presented in *People ex Rel. Cornell Steamboat Company v. Sohmer* (206 N. Y. 651). The tax is imposed on the relator not for the franchise of operating the subway, but for being a corporation and operating the subway in that capacity instead of as individuals, partners or tenants in common. There is nothing in the section of the Rapid Transit Act cited that gives the person or persons who contract with the municipality the right to be a corporation, and what the relator is now charged for is merely for that privilege.

Willard Bartlett, Hiscock, Chase, Collin and Hogan, JJ., concur with Werner, J., and Curren, Ch. J., Concur in memorandum.

Order affirmed.

176 STATE OF NEW YORK,

Court of Appeals, State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of *People ex Rel. Interborough R. Tr. Co., Appellant, v. William Sohmer, as Comptroller &c.*, Resp'd't, decided by the Court of Appeals on the 21st day of January, 1913, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 24th day of February, 1913.

J. NEWTON FIERO,

*As Reporter of the Court of Appeals
of the State of New York.*

Attest:

[Seal Court of Appeals, State of New York.]

[L. s.] R. M. BARBER,

Clerk of the Court of Appeals.

STATE OF NEW YORK,

Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports

thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of *People ex Rel. Interborough R. Tr. Co., Appellant, v. William Sohmer, as Comptroller &c., Resp'd't*, decided by the said Court of Appeals on the 21st day of January, 1913, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 24th day of February in the year of one thousand, nine hundred and thirteen.

EDGAR M. CULLEN,

*As Chief Judge of the Court of Appeals
of the State of New York.*

177 *Opinion of the Appellate Division of the New York Supreme Court in and for the Third Judicial Department in*

PEOPLE ex Rel. INTERBOROUGH RAPID TRANSIT COMPANY
against
CLARK WILLIAMS, Comptroller of State of New York.

Reported, 138 App. Div., 612.

178 *Opinion of the Appellate Division of the New York Supreme Court in and for the Third Judicial Department in*

"PEOPLE ex Rel. INTERBOROUGH RAPID TRANSIT COMPANY
against
CLARK WILLIAMS, Comptroller of the State of New York."

Reported, 138 App. Div., 612.

Certiorari issued out of the Supreme Court and attested on the 11th day of December, 1909, directed to Clark Williams, as Comptroller of the State of New York, commanding him to certify and return to the office of the clerk of the county of Albany all and singular his proceedings had in denying the application of the relator for a revision of the amount of its franchise tax under section 185 of the Tax Law for the years ending June 30, 1907, 1908 and 1909. (See Gen. Laws, Chap. 24 (Laws of 1896, chap. 908), § 185, as am'd by Laws of 1906, chap. 474; revised into Consol. Laws, chap. 60 (Laws of 1909, chap. 62), § 185).

The relator operates the elevated railroads of the Manhattan Railway Company under a lease, the terms of which do not otherwise appear. The tax imposed against that company is not questioned;

the only question here is whether the relator is liable to pay the tax of one per centum on its earnings outside of the Manhattan elevated railroad and the three per centum upon the excess dividends upon its own stock.

James L. Quackenbush (Ralph Norton of counsel), for the relator.

Edward R. O'Malley, Attorney-General (Edward H. Letchworth, Deputy, of counsel), for the respondent.

KELLOGG, J.:

The statute in question imposes this tax only on elevated railroads, or surface railroads not operated by steam. The mere fact that an underground railroad for a short distance may run upon the surface, and for another short distance upon an elevated structure, does not make it a surface or elevated railroad. Its distinctive character is an underground railroad. It is not, therefore, taxable under this statute. The relator is exempt from taxation in respect to anything it does pursuant to the contract with the city under which the subway was constructed and is operated. (*People ex Rel. Interborough Rapid Transit Co. v. Tax Com'rs*, 126 App. Div., 610; *affd.*, 195 N. Y. 618).

The statutory exemption should be given a fair construction in order to carry out the real purpose for which it was allowed. The exemption from taxation was an inducement which led to the construction and operation of the subway, and should be fairly observed.

180 It follows, therefore, that aside from the fact that the relator is operating the Manhattan elevated railroad as lessee, it would not be subject to this tax. The statute provides that the tax against the owning or operating company shall be one per centum upon its gross earnings from all sources within the State. The petition shows that the relator is operating the elevated railroads of the Manhattan Company, and the gross earnings of the relator are, therefore, made up of its earnings from its subway and from the Manhattan elevated roads.

The tax is not upon earnings or property, but is for the privilege of exercising a corporate franchise in carrying on the business. The fact that the relator, with reference to the subway, is exempt from taxation except as to the real estate owned or employed by it, does not permit us, in ascertaining the gross earnings of the company from all sources, to eliminate the earnings of the subway. The earnings are used simply as a method of determining what the use of the franchise is worth; a measure merely to determine how much tax should be paid upon the franchise. Earnings from patents, United States bonds or other property expressly exempt from taxation are not to be excluded in determining the amount of the earnings of a corporation which is to be used in fixing the value of its franchise. (*People ex Rel. United States A. P. P. Co. v. Knight*, 174 N. Y., 475, 482).

181 The gross earnings of the relator from all sources within the State must be taken into account in computing this tax.

The tax upon the surplus dividends is upon the actual amount of paid-up capital "employed" by the corporation. This means employed by the corporation in the ownership or operation of the road. We assume from the record that the elevated roads are operated under their own charter, and the relator, as lessee, is only interested financially in the net earnings of that corporation after paying the interest upon its bonds and the rental to be paid. A tax is imposed by this section upon the excess dividends of such leased corporation. It is not probable that the Legislature intended by this provision that the lessor company must pay a tax upon its excess dividends for the privilege of operating its railroad, and that the lessee company must pay a tax upon its excess dividends for the privilege of operating the road as lessee, thus making a double taxation. The first part of the section expressly declares that the gross earnings from all sources shall be considered, showing that not only the earnings of the lessee should be computed, but all earnings of the operating company. The latter part of the section omits the general words, and by the use of the word "employed" makes it clear that the excess of dividends is to be considered, so far as the lessee is concerned, only upon

182 the amount of its capital stock, if any, employed in the business. It does not appear that any of the capital stock of the relator is employed in the operation of the elevated road; on the contrary, we infer from the record that the relator receives from the operation of that road more than all it pays on account thereof, so that the lease is a profit to it.

The Tax Law of 1896 first made a company operating an elevated or surface road not operated by steam subject to this tax, and eight years thereafter, in 1903, the relator voluntarily, and for its own profit, took the lease of the elevated railroads of the Manhattan Elevated Railway Company, and has since continuously operated them. Immunity from taxation is given to the relator with reference to its subway and its operation thereof, and such immunity is a property right. But when it voluntarily, for its own profit, took the lease of the other railroads and operated them, it made itself subject to any liability for taxation which any other lessee would have incurred by reason of such lease and operation. By taking the lease and operating the leased roads it voluntarily subjected itself to a tax with reference thereto, in computing which tax its earnings "from all sources" may be considered. The terms of the lease do not appear, but the petition admits that the relator has continuously operated the elevated railroads as lessee, and this admission brings it within the terms of the taxing statute.

183 It follows from these views that the relator is liable to pay a tax of one per centum on its gross earnings from all sources within the State, including the earnings of the subway as well as its earnings from other sources, and that the excess dividends declared by the relator upon its own stock cannot, upon the facts shown, be taken into consideration in stating the tax.

The determination is, therefore, modified by striking therefrom the excess dividend tax on the Interborough stock, and as so modified confirmed, without costs.

All concurred, except Smith, P. J., who wrote for annulment in an opinion in which Sewell, J., concurred.

SMITH, P. J. (dissenting):

This relator's road was constructed under the Rapid Transit Act (Laws of 1891, Chap. 4), as amended by chapter 752 of the Laws of 1894, chapter 729 of the Laws of 1896, and chapter 616 of the Laws of 1900 and other statutes. Section 35 of the act, added in 1894, as amended in 1900, reads:

"§35. The equipment to be supplied by the person, firm or corporation operating any such road, shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road."

This section has been since amended by chapter 599 of the Laws of 1905, chapter 472 of the Laws of 1906, and chapter 498 of the Laws of 1909, but the repeal of the exemption by these amendments does not seem to apply to this relator. (See *People ex Rel. Interborough Rapid Transit Co. v. Tax Comrs.*, 126 App. Div., 610; *affd.*, 195 N. Y., 618).

The question here for determination is not, as contended by the learned Attorney-General, whether exempt property may be made the basis of an estimate of a franchise tax. That question has been conclusively settled in the courts of this State and of the United States. The ultimate fact which we here must ascertain is the intention of the Legislature in passing this section of the Rapid Transit Act. From what taxes was it intended to give immunity?

While it is undoubtedly true that a statute of exemption must be construed strictly, there are other rules of construction which must also be considered in construing this statute, which has become a contract between the State and this relator. First. This language was chosen by the State itself, and as the State dictated its form it should be bound by what at least is fairly implied therefrom. (*Imperial Shale Brick Co. v. Jewett*, 169 N. Y., 143). Again:

"Where the terms of a promise admit of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee."

(*White v. Hoyt*, 73 N. Y., 505). With these rules of construction in mind let us look for a moment to the history of this legislation. The problem of transit facilities in New York city had become a

most serious one. Greater facilities were imperatively demanded, and demanded speedily. Roads had been constructed upon the surface of the streets and above the streets. The only avenue of relief seemed to be subway construction. But that construction required large amounts of money. The franchise was to be sold at public auction. It may fairly be assumed that for the purpose of making this franchise more attractive, and for the purpose of inducing investors to bid therefor, this immunity from taxation was given. If this be the purpose of the enactment, it should be construed as it would be fairly understood by intending purchasers, and not as a deception and a trap. Before this time it had become a part of the policy of the State to tax franchises of corporations. If it had been intended in this act to reserve the right to the State to tax this franchise, in fairness to the investors whose bids were sought, that should have been stated in this statute. It is also significant that by the terms of the statute the property of the company succeeding to the contractor's rights is not made exempt. The person, firm or corporation owning the contract is exempted "from taxation in respect to his, their or its interest under said contract, and in respect to the rolling stock and all other equipment of said road." I submit that this exemption, so expressed, would be reasonably and even necessarily understood as giving complete immunity to those who invested their money in this contract from all taxation, direct or indirect, in respect thereto. The language hardly could have been broader. The great State of New York cannot afford by any technical construction to limit the fair intentment of its promise. After the passage of this act, and by chapter 908 of the Laws of 1896 (Gen. Laws, chap. 24), section 185 of the Tax Law was enacted so as to tax the gross earnings of elevated and surface roads not operated by steam. This section of the Tax Law has been amended by chapter 474 of the Laws of 1906 and revised into section 185 of the present Tax Law (Consol. Laws, chap. 60; Laws of 1909, chap. 62). This statute gave no authority to lay this tax upon any road constructed under the Rapid Transit Act under which this relator's road was built. This would seem to be a clear recognition by the Legislature of the immunity from all taxation granted by section 35 of the Rapid Transit Act, and constitutes, I submit, a legislative construction of that act.

Strange to say, however, this is the only statute under which the right to lay this tax is claimed. This right is sustained by Mr.

Justice Kellogg in the prevailing opinion not upon any right therein given to tax the franchise of the Interborough Rapid Transit Company, but simply upon the right therein given to tax the franchise of any company which owns or operates an elevated railroad one per cent upon the gross earnings "from all sources within this State." It appears that this same relator, while owning the contract rights under the Rapid Transit Act, also is operating the Manhattan elevated railroad in the city of New York, and because of this fact is held by Mr. Justice Kellogg to have forfeited the exemption, if any, which it would otherwise have under the Rapid Transit Act. This proposition seems to me radically unsound for two reasons: First. The exemption is given by a special statute. The

Tax Law, which is held to have overruled this exemption, is a general statute. Authority is not needed to the proposition that a general statute presumably does not repeal or modify a special act. The two must be read together, and the relator assessed upon the gross earnings of the Manhattan Elevated Railway Company, and not upon the gross earnings from the subway constructed under the Rapid Transit Act. Second. This promise of exemption, thereafter acted upon by the relator, became a contract between the relator and the State, which cannot be impaired by any subsequent legislative act, general or special. This rule of law dates back as far as Dart-

mouth College v. Woodward (4 Wheat., 518), and has been
 188 consistently held from that time to the present. If this property were simply made exempt from taxation the corporation could confessedly be taxed for the franchise to operate either the subway or the elevated road, and these receipts be made the basis of that tax. If I am right in my construction, however, the statute has gone further, and by fair intendment has not only exempted the property but has guaranteed immunity to the company operating the road from all taxation which includes a franchise tax as well. If this be the intendment of the statute it could not have been within the mind of the Legislature to take from the operating company this immunity simply because the company was operating an elevated road, nor could the Legislature lawfully do so and preserve the inviolability of contract rights under the Federal Constitution. (Art. 1, § 10, subd. 1.)

The case of State v. Baltimore & Ohio R. R. Co. (48 Md. 49) presents a very close parallel to the case at bar. There the phraseology of the Maryland act (Laws of 1826-7, chap. 123, § 18) was: "The shares of the capital stock of the said company shall be deemed and considered personal estate and shall be exempt from the imposition of any tax or burthen." It was thereafter sought to impose a franchise tax upon that corporation, and it was held that the courts were not bound by the literal meaning of the words of the statute, but must look to the connection in which they are used, the subject-matter to which they are applied and the motives and objects
 189 which actuated the Legislature in conferring this privilege.

The conclusion of the court in that case, as expressed in the opinion, reads as follows: "The Legislature, beyond all question, intended to confer a substantial benefit on the company and thereby to induce capitalists and others to invest their means in the construction of a road which every one deemed of so much importance to the State. And to say that they meant to exempt the shares only and to reserve the right to tax the property and franchises, is a construction that would render the privileges thus granted of no practical benefit to the appellee. So, considering the question as one of first impression, we are of opinion that the 18th section exempts the property and franchises of the company from taxation. If the franchises are exempt, it would necessarily follow that the gross receipts derived from the exercise of its franchises are also exempt." In Nichols v. New Haven & Northampton Co. (42 Conn. 103), the language of the exemption was "that the stock and income * * *

shall be forever exempt from taxation." (See Private Laws of Conn. vols. 1-2, pp. 318, 319.) The opinion of the court in part reads: "The charter of the company pretends to hold out inducements to persons to subscribe for the stock. It says, 'Whereas, said canal, if completed, would be of great public utility; therefore, for the purpose of inducing persons to subscribe to the stock of said company, be it resolved, &c.' There can be no escape from the conclusion that this language was intended for deception unless the body politic of the company was intended to be included, and was included in the promised exemption from taxation.

"It is true that all exemptions from taxation are to be construed strictly in favor of the State and against the grantee; but this principle has never been carried so far as to require courts to be governed by the strict letter of the grant, ignoring its manifest import, or so far as to justify bad faith in the making of such contracts.

"It might be claimed with truth that the value of the franchise of a corporation enters into and forms a part of the value of the stock of the corporation. The franchise is valuable in proportion to the yearly net income which the corporation receives and is likely to receive in carrying on its business. The stock of the corporation derives its value to a great extent from the franchise and income together; and in some cases these sources of value double and treble its nominal value. Hence, the value of the stock of a corporation embraces the value of its franchise and consequently, if the stock is exempt from taxation, so must the franchise likewise be exempt. (Wilmington Railroad Company v. Reid, 13 Wallace, 264)." In *Pacific R. R. Co. v. Maguire* (20 Wall. 36) the statute provided for an exemption from taxation of the Pacific railroad, its bed and of its buildings, machinery, engines, cars and other property. The

opinion of the court in part reads: "In *The Wilmington Railroad v. Reid* (13 Wallace, 264), it was held that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also. In the case before us the roadbed, buildings, machinery, cars, and other property not only, but the 'Pacific Railroad' is declared to be exempt from taxation. We cannot doubt that a contract not to tax a railroad company or its property is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers." For these reasons I vote for the annulment of the Comptroller's determination.

Sewell, J., concurred.

Determination modified by striking therefrom the excess dividend tax on the Interborough stock and as so modified confirmed, without costs.

192 OFFICE OF THE SUPREME COURT REPORTER,
State of New York, ss:

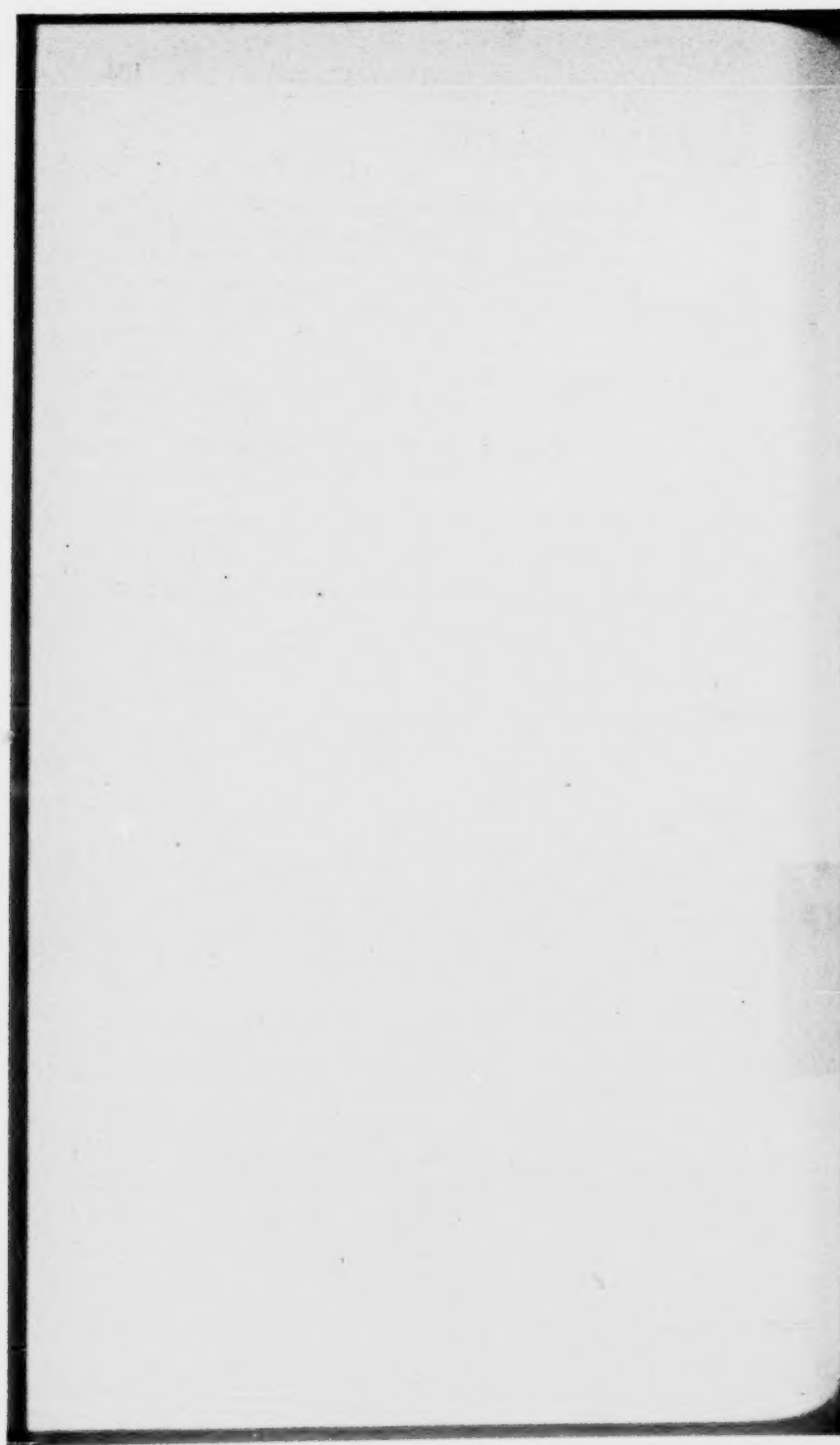
I, Fletcher W. Battershall, Deputy Supreme Court Reporter, State of New York, hereby certify that I have compared the within transcript of the opinions in the case of People ex rel. Interborough Rapid Transit Company v. Williams, reported in 138 Appellate Division, 612, with the original contained in the official Appellate Division reports and I further certify that it is a correct and true transcript thereof.

Given under my hand and seal at the office of the Supreme Court Reporter in the city of Albany, state of New York, this 24th day of February, 1913.

[L. s.]

FLETCHER W. BATTERSHALL,
Deputy Supreme Court Reporter.

Endorsed on cover: File No. 23,592. New York Supreme Court. Term No. 129. The People of the State of New York ex rel. Interborough Rapid Transit Company, plaintiff in error, vs. William Sohmer, Comptroller of the State of New York. Filed March 19th, 1913. File No. 23,592.



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OCTOBER TERM—1914.

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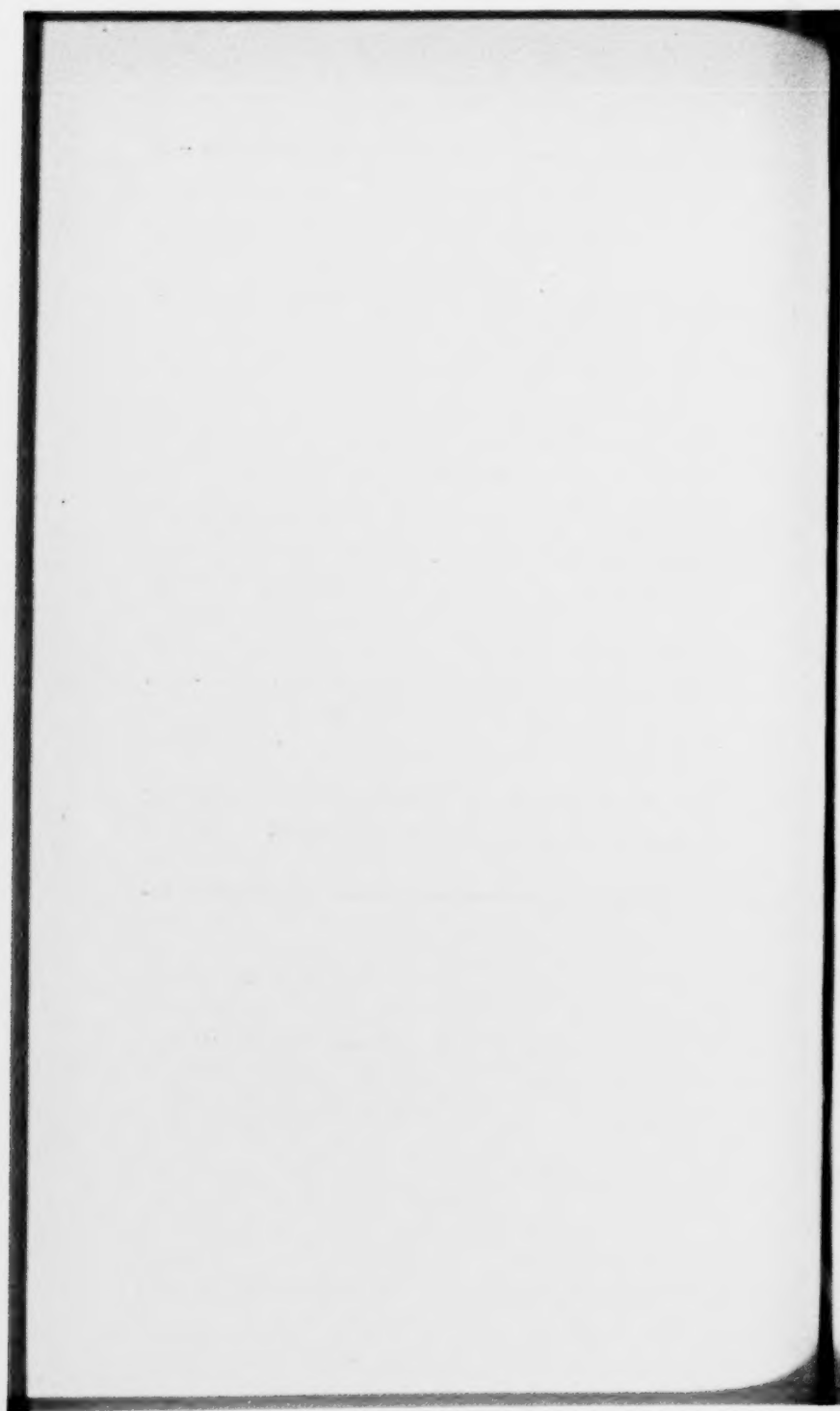
THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*
INTERBOROUGH RAPID TRANSIT COMPANY,
Plaintiff-in-Error,

vs.

WILLIAM SOHMER, AS COMPTROLLER OF THE
STATE OF NEW YORK.
Defendant-in-error.

BRIEF FOR PLAINTIFF-IN-ERROR.

GEORGE W. WICKERSHAM,
JAMES L. QUACKENBUSH,
RALPH NORTON,
of Counsel.



SUBJECT INDEX.

THE QUESTION INVOLVED IN THIS CASE.

This case presents the question whether or not the plaintiff-in-error, a corporation engaged in operating subway railroads belonging to the municipality, in the City of New York, and all of whose capital is invested in the equipment thereof, under contracts or leases made in 1900 and 1902 respectively, pursuant to statute expressly exempting "the person, firm or corporation" operating such railroad "from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road," is liable to an annual tax "computed upon the basis of the amount of its capital stock employed during the preceding year within this State," under Section 182 of the New York Tax Law of 1909, imposing a tax upon corporations doing business within the State, "for the privilege of doing business or exercising its corporate franchises within this State," and an additional tax of one-half of one per cent. "upon its gross earnings within this State," including those derived from said railroad under Section 184 of the same act, imposing such tax on certain designated "and other transportation corporations."

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ARGUMENT.

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The State statutes under consideration in this case, and extracts from the Reports of the Board of Rapid Transit Railroad Commissioners, and the Report of the New York Chamber of Commerce, to which reference is made in this brief, are separately printed, and are referred to herein as "Appendix, page —."

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 129.

PEOPLE OF THE STATE OF NEW
YORK, *ex rel.*, INTERBOROUGH
RAPID TRANSIT COMPANY,
Plaintiff-in-Error,

against

WILLIAM SOHMER, as Comp-
troller of the State of New
York.

In Error to the
Supreme Court
of the State of
New York.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement.

The writ in this case, which was allowed by Mr. Justice HUGHES, on February 20, 1913, is directed to the Supreme Court of the State of New York, in and for the Third Judicial Department. It brings up for consideration by this Court a final order entered upon a remittitur from the Court of Appeals of the State of New York, in certiorari proceedings duly instituted to review two determinations of the Comptroller of the State of New York, wherein, acting under the alleged authority

of certain sections of the New York Tax Law (Consol. Laws of 1909, Chap. 62), he assessed, and later refused to revise and readjust, certain State taxes imposed upon relator, the plaintiff-in-error here.

Plaintiff-in-error is the operating lessee of two distinct systems of railroads in The City of New York: (1) The rapid transit railways, or subways, owned by the municipality, under contracts entered into in 1900 and 1902 respectively and assigned to plaintiff-in-error in 1902 and 1905, and (2) the elevated lines, owned by the Manhattan Railway Company, under lease made in 1903.

The issues have been twice before the New York Courts. The controversy first arose over the action of the Comptroller of the State in assessing Interborough Rapid Transit Company for taxes under a section (No. 185) of the Tax Law, which, in terms, related only to corporations operating elevated railroads and surface railroads other than steam. In taking this action, the Comptroller entirely disregarded the company's contractual relations to the municipally-owned subway in The City of New York, and determined that, simply because it was operating the elevated lines in The City of New York, it became subject to franchise taxation as an elevated railroad, measured by a percentage of *all* its earnings. The Company contested this assessment by appropriate legal proceedings, in which it contended that it was entirely exempt from franchise taxation with respect to its subway operation, and that any assessment against it because of such operation would amount to an impairment of the obligations of its contracts with The City of New York, made pursuant to express legislative authority, and also

of its contract made with the State itself; further, that it could not by any possibility be taxed as an elevated railroad corporation with respect to *all* its earnings. In this first proceeding the Court of Appeals, in an opinion reported *sub nomine*, *People ex rel. Interborough Rapid Transit Company v. Williams*, 200 N. Y., 93 (Record, fols. 150-162), denied the claim for total exemption, but held that plaintiff-in-error had been erroneously assessed under Section 185 of the Tax Law upon *all* its earnings. Accordingly a new assessment was ordered. Since this was not a final determination of the rights of the plaintiff-in-error, it was impossible at that time to bring the question before this Court. In this same proceeding, the minority of the Appellate Division of the Supreme Court, in an opinion written by SMITH, *P. J.*, reported under the same title in 138 App. Div., 612 (Record, fols. 178-191), fully upheld the claim for exemption now presented to this Court.

As a result of the decision of the Court of Appeals in the *Williams* case, the Comptroller, then SOHMER, made new assessments against plaintiff-in-error as operator of the municipal rapid transit railway, or subway, under sections of the Tax Law of 1909 (Nos. 182 and 184). These second assessments were made the subject of a new certiorari proceeding, which has resulted in their confirmation by the New York courts. In this latter proceeding, the Court of Appeals in an opinion reported *sub nomine*, *People ex rel. Interborough Rapid Transit Company v. Sohmer*, 207 N. Y., 270 (Record, fols. 173-175), reached a conclusion in accordance with its previous opinion in the *Williams* case with respect to the claim for exemption. It is from the order of the New York Supreme Court entered upon the remittitur from the Court of Appeals

on the latter decision, that the present writ of error has been allowed.

A brief history of the legislation respecting the construction, ownership and operation of rapid transit railways in The City of New York, and the provisions for the organization of corporations to operate the same, is essential to an understanding of the contractual rights of plaintiff-in-error claimed to have been impaired by the legislation under which the State taxing authorities have acted.

By the Rapid Transit Act, as originally passed in 1891, municipal ownership was not contemplated (Appendix, pp. 1-30). The act of that year provided a method whereby corporations could be formed for the purpose of building and operating underground rapid transit railroads in the City of New York, and also provided for the acquisition of franchises necessary therefor upon terms to be determined. At that time great doubt was expressed as to the possibility of operating any such road at a profit, even if it should be demonstrated to be practicable to build it—a proposition which seemed to be equally doubtful. At any rate, no corporation or group of financiers was found, willing to risk their capital in such an enterprise (Record, fols. 33-34; Appendix, p. 143).

The demand for improved transit facilities in New York was so great, however, that in 1894 a general amendment to the Rapid Transit Act of 1891 was passed (Chap. 752, Laws of 1894; Appendix, pp. 35-53) permitting the question whether a rapid transit railroad should be constructed at the City's expense to be submitted to the voters at the next general election (Record, fols. 34-35). The election being in favor of municipi-

pal ownership, other sections of the amended Rapid Transit Act of 1894 then became effective, providing that the road when constructed should be leased for a term of years to the contractor—a person, firm or railroad corporation. As an additional inducement for bids from responsible parties to undertake a work of such magnitude, the Rapid Transit Act was amended by adding a new section, numbered 35, which exempted the person, firm or corporation operating any such road from taxation in respect to his, their or its interest therein, and in respect to the rolling stock and other equipment of said road (Appendix, p. 46). In 1896, this section was amended by including in it a comprehensive definition of the equipment to be supplied in connection with such road, and by making the terms of the exemption more comprehensive (Appendix, p. 89).

The Board of Rapid Transit Railroad Commissioners thereupon prepared a contract for the construction, maintenance and operation of a rapid transit railroad from a point near the City Hall in the Borough of Manhattan to points in the northerly part of the City on the east and west sides, to be constructed by the contractor for the City at the latter's expense, and for a price to be agreed upon, the contractor undertaking to provide the equipment at his own expense, and after completion to operate the railroad upon the terms and conditions hereinafter more particularly specified, which were briefly, that after the payment of expenses of operation the net revenues should be applied to the payment of interest upon bonds issued by the City to provide funds for construction, and a further amount towards a sinking fund to provide for their retirement at

maturity, and the balance was to be retained by the contractor. The exemption from taxation contained in the amended Section 35 of the Act was by necessary implication incorporated into and made a part of the advertisement for bids for construction of the rapid transit railroad, and was expressly contained in the contract and became a part of the consideration therefor (Record, fol. 35).

The City reserved a lien on all of the equipment and other property of the contractor as security for the performance of his obligations, and agreed that at the expiration of the lease it would purchase the equipment then on hand at an appraised value.

This contract, dated February 21, 1900, known as Contract No. 1, was offered at public bidding and was awarded to one John B. McDonald, who undertook to construct the railroad for the sum of \$35,000,000.

A corporation was organized pursuant to the Business Corporations Law of New York, under the name of Rapid Transit Subway Construction Company, with a capital of \$6,000,000, which guaranteed the performance by McDonald of his contract, and the work of construction was entered upon by McDonald under contractual arrangements with the last-mentioned company.

When the possibilities of subway construction were shown by the progress made under Contract No. 1, a second contract, known as Contract No. 2, was entered into by the City of New York—this time with the said Rapid Transit Subway Construction Company, directly. It was dated July 21, 1902, and provided for the construction of an extension from the terminus of the railroad embraced in Contract No. 1, near the City Hall,

down Broadway, and under the East River, to a point in the Borough of Brooklyn.

The exemption from taxation was still in force, when Contract No. 2 was made; indeed, it was reenacted in an amending act of 1900 (Laws of 1900, Chap. 616, Sec. 35; Appendix, pp. 103, 104), in the same language as contained in the act of 1896, and such exemption formed a necessary and valid part of the consideration for that contract.

From the inception of this enterprise, it was contemplated that the railroad, when completed, should be operated by a corporation—either one already in existence, if and when approved by the Board of Rapid Transit Railroad Commissioners, or by one formed for that express purpose. No existing corporation was found available for the purpose, and doubts arising as to whether or not under the existing general railroad law of the State a corporation could be organized to enter into contracts for the maintenance and operation of railroads owned by a municipality, application was made to the Legislature, which, in 1902, enacted an amendment to Section 34 of the Rapid Transit Act, expressly providing that a corporation might be organized for that purpose under the General Railroad Law, which corporation, when approved in writing by the Board of Rapid Transit Railroad Commissioners, should be authorized and empowered to enter into any contract permitted by law for the construction and operation, or the maintenance and operation when constructed (including the equipment thereof, if desired), of any rapid transit railway constructed at the expense of a city, as provided in the Rapid Transit Act (Appendix, p. 121). The statute and the contract recognized the right of the contractor with the written consent of the Rapid Transit

Board to assign the contract—but not any part of it. In order to carry out the financial plans, the Legislature in the same amending section of 1902 further provided that the contractor for such a railway, with the written consent of the Board of Rapid Transit Railroad Commissioners, might assign either the whole contract or

“separately the right or obligation to maintain and operate the said road or roads for the remainder of the term of years specified in such contract, and all rights with respect to such maintenance and operation, or included in the leasing provisions of such contract, but subject to all the terms and conditions therein stated; provided, however, that the assignee or assignees shall in and by such assignment assume all of the obligations of the original contractor under or with respect to such leasing provisions, and all obligations which relate in any way to such operation and maintenance; provided further, that the said Board before giving its consent shall be satisfied that the pecuniary responsibility of the assignee or assignees shall be no less than that of such original contractor; and provided further that all of the security or securities which the City shall have received for the performance by the original contractor of such leasing provisions and of all provisions of the contract with respect to such operation and maintenance shall continue in full force, as provided in such contract or any modification thereof, as security for the performance by such assignee of all obligations of the contractor under or with respect to such leasing provisions, and such maintenance or operation” (Appendix, p. 119).

Pursuant to these statutory provisions, which were approved April 11, 1902, plaintiff-in-error

was duly organized and incorporated May 6, 1902, having been first approved in writing by the Board of Rapid Transit Railroad Commissioners on May 1, 1902 (Record, fols. 30-31, 133-145). Pursuant to the provisions of the statutes aforesaid and with the written approval of said Board, McDonald, on July 21, 1902, assigned to Interborough Rapid Transit Company the lease or operating part of Contract No. 1, together with the obligation to provide the equipment thereof; Rapid Transit Subway Construction Company in like manner and with like approval assigned to it the lease or operating part of Contract No. 2 on August 10, 1905 (Record, fol. 32). By a separate agreement in writing between McDonald, the City and the Interborough Rapid Transit Company, the latter in consideration of the assignment to it of the leasing part of the contract, and the consent thereto of the Board of Rapid Transit Railroad Commissioners, guaranteed the performance by McDonald of his undertaking to construct the railroad.

Upon the completion of the railroad under Contract No. 1, Interborough Rapid Transit Company entered upon its operation, having previously furnished the equipment thereof at its own expense, and, similarly, when the extension under Contract No. 2 was completed, it operated the entire railroad constructed under both contracts; and said Company has ever since been continuously engaged in the operation of said railroads, pursuant to the provisions of the several contracts so assigned to it, receiving and disposing of the revenues therefrom in accordance with the provisions of such contracts.

It is undisputed that plaintiff-in-error's capital of \$35,000,000 is wholly invested in the equipment

and operation of the subway railways (per Hiscock, J., Record, p. 85).

Since April 1, 1903, plaintiff-in-error also has continuously operated and now operates the lines of elevated railroad of the Manhattan Railway Company, in the Boroughs of Manhattan and The Bronx, under a lease dated January 1, 1903. None of its capital is employed in the operation of this railroad (Record, fol. 33).

The reports rendered by plaintiff-in-error to the State Comptroller have shown the earnings from operation of both systems of railroad operated by it, but the earnings of the company from operation of the rapid transit railroad have been reported under protest, and only after demand by the Comptroller (Record, fols. 64, 77, 90, 104).

The total authorized and issued capital stock of plaintiff-in-error is \$35,000,000. During the year ending October 31, 1906, dividends were declared and paid upon that capital stock at the rate of $8\frac{1}{2}\%$ per annum. For each of the three years ending October 31, 1907; October 31, 1908, and October 31, 1909, respectively, dividends were paid and declared at the rate of 9% per annum (Record, fol. 47).

As first assessed by the Comptroller under the provisions of Section 185 of the Tax Law, the franchise tax for the year ending June 30, 1907, which has been duly paid, was \$285,073.33 (Record, fol. 37). As revised and reduced, the tax for that year amounts to \$260,952.57 (Record, fol. 43). Of this, plaintiff-in-error does not dispute liability for \$144,916.82, being its franchise tax for that year, at the rate prescribed in Section 185, with respect to its operation of the elevated railroads, but claims that the balance has been illegally assessed.

As first assessed by the Comptroller under the

provisions of Section 185 of the Tax Law, the franchise tax for the year ending June 30, 1908, which has been duly paid, was \$305,294.70 (Record, fols. 38, 39). As revised and reduced, the tax for that year amounts to \$277,626.72 (Record, fol. 43). Of this plaintiff in error does not dispute liability for \$144,958.74, being its franchise tax for that year, at the rate prescribed in Section 185, with respect to its operation of the elevated railroads, but claims that the balance has been illegally assessed.

As first assessed by the Comptroller under the provisions of Section 185 of the Tax Law, the franchise tax for the year ending June 30, 1909, which has been duly paid was \$324,100.36 (Record, fol. 40). As revised and reduced, the tax for that year amounts to \$286,315.11 (Record, fol. 43). Of this plaintiff-in-error does not dispute liability for \$143,530.02, being its franchise tax for that year, at the rate prescribed in Section 185, with respect to its operation of the elevated railroads, but claims that the balance has been illegally assessed.

As first assessed by the Comptroller under the provisions of Section 185 of the Tax Law, the franchise tax for the year ending June 30, 1910, which has been duly paid, was \$346,767.09 (Record, fols. 44-45). As revised and reduced, the tax for that year amounts to \$301,427.11 (Record, fol. 46). Of this plaintiff-in-error does not dispute liability for \$151,087.14, being its franchise tax for that year, at the rate prescribed in Section 185, with respect to its operation of the elevated railroads, but claims that the balance has been illegally assessed.

The Comptroller's method in determining the amount of these franchise taxes, both as originally assessed and as reviewed in this proceeding, is

shown by the following statement of the taxes for the year ending June 30, 1910. The method used in each of the other years in question is identical although the total taxes vary with the amount of gross earnings.

**ORIGINAL ASSESSMENT UNDER SECTION 185 OF THE
TAX LAW.**

Tax upon gross earnings received from operation of the elevated lines.	
Rate 1%	\$151,087.14
Tax upon gross earnings received from operation of the Subway. Rate 1%	143,179.95
Excess dividend tax 3% on \$1,750,000 (excess of Interborough Rapid Transit Co. dividend for the year over 4% on its capital stock....	52,500.00
Total.....	\$346,767.09

**REVISED ASSESSMENT UNDER SECTIONS 182, 184 AND
185 OF THE TAX LAW.**

Tax upon gross earnings received from operation of elevated lines. Rate 1%	\$151,087.14
Tax upon gross earnings received from operation of Subway. Rate \$.005.	71,589.97
Tax on capital stock based on business for year ending Oct. 31, 1909, on \$35,000,000, 9% dividend. Rate \$.002 $\frac{1}{4}$	\$ 78,750.00
Total.....	\$301,427.11

Specifications of Error.

Three federal questions and assignments of error (Record, pp. 9-11) are now urged, viz.:

1. That the tax laws of the State as construed by the Court of Appeals impair the obligation of the contracts between plaintiff-in-error and the City of New York respecting the equipment, maintenance and operation of the rapid transit railways.

2. That the assessment imposed on the plaintiff-in-error under the General Tax Law of 1909, in respect to its capital invested in the equipment of the rapid transit railways and the gross earnings from their operation, by the State taxing authorities with the approval of the Court of Appeals, constitutes an impairment of the obligation of the contracts exempting it from taxation entered into with the City of New York under legislative authority.

3. That the assessment imposed on the plaintiff-in-error, under the said General Tax Law, by the State taxing authorities, with the approval of the Court of Appeals, in so far as it is based upon its capital invested in the equipment of the rapid transit railways, and upon the earnings derived from their operation, constitutes a taking of property without due process of law in violation of the 14th Amendment.

Federal Question Raised in State Court.

In its application to the State Comptroller for revision, plaintiff-in-error claimed exemption from

taxation, in respect to its interests under the contracts for the operation of the rapid transit railways, and the equipment thereof, and that the State Tax Law under which the assessment was made constituted an impairment of the obligation of its said contracts (Record, p. 54). The same contention was made in its letter of protest which accompanied payment of the tax required by the State statute as a condition precedent to bringing *certiorari* to review the Comptroller's action (Record, p. 59), and in the petitions for the writ of *certiorari* (Record, pp. 28-29). The question was considered at the Appellate Division in the dissenting opinion of SMITH, *P. J.* (Record, p. 101), and in the opinion of HISCOCK, *J.*, on the first appeal to the Court of Appeals (Record, p. 83). The decision of that Court was against the contract right relied upon by plaintiff-in-error.

ARGUMENT.**I.**

The contracts authorized by the Legislature of New York exempted the person, firm or corporation operating the railways constructed under their provisions, from all taxation in any form, whether under the guise of a franchise tax, or otherwise, "in respect to his, its or their interest under the contract, and in respect to the rolling stock and all other equipment of said road"—excepting real property owned or employed by it in connection therewith.

There is no question in this case that the Legislature of New York enacted the exemption. The controversy arises wholly as to the extent of such exemption.

The exemption clause as originally enacted in 1894 (Chap. 752, Appendix, p. 46) read as follows:

"The person, firm or corporation operating such road shall be exempt from taxation in respect to his, their or its interest *therein*" (*i. e.*, in said road).

This language might have limited the exemption to what is called in the New York Tax Law the *special* franchise, or right to operate the railroad in the public highways, etc.; that is, the franchise which constitutes property, which survives the dissolution of the corporation and passes to its receivers or liquidators to be sold for the benefit of its creditors and stockholders.

People v. O'Brien, 111 N. Y., 1.

Wilmington Co. v. Reid, 13 Wall., 264.

But the language of the exemption was materially changed by the amendment of 1896 (Chap. 729, Appendix, p. 89), by striking out the word "therein," thus making the clause read:

"The person, firm or corporation operating such road shall be exempt from taxation in respect to his, their or its interest *under said contract*," etc.,

and this language was repeated in the amending act of 1900 (Chap. 616, Appendix, p. 104).

This amendment is significant of a purpose to extend the exemption to every form of taxation which without it might impose upon the operator of the rapid transit railway any burden with respect to its interest under the contract with the municipality. That contract was to be the measure of the benefits which might be derived from the operation of the railways, and those benefits were not to be liable to impairment by the State which granted the exemption under the guise of any kind of taxation.

The State Court has found in favor of the validity of the statute granting to plaintiff-in-error exemption from taxation, but denies the scope of the exemption claimed. It is, therefore, a question for the independent determination of this Court.

Powers v. Detroit and Grand Haven Ry.,
201 U. S., 543.

In that case BREWER, *J.*, said (p. 556):

"It has been often decided by this Court, so often that a citation of authorities is unnecessary, that the Legislature of a State may, in the absence of special restrictions in its constitution, make a valid contract with

a corporation in respect to taxation, and that such contract can be enforced against the State at the instance of the corporation. It is said that we are not concluded by a decision of the Supreme Court of a State in reference to the matter of contract; that while the rule is to accept the construction placed by that Court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. * * *

But here the Supreme Court of the State has ruled in favor of the continued existence of a corporation, and the applicability of certain statutes, and when upon the face of such statutes a valid contract appears, we accept the ruling that the statutes are valid and applicable enactments. In other words, the Supreme Court of the State having sustained the validity of a statute from which a contract is claimed, this Court follows that decision and starts with the question, what contract is shown by statute?"

The dissenting opinion of SMITH, *P. J.*, in the Appellate Division of the Supreme Court, printed at pages 99 *et seq.* of the record, briefly and accurately states the history of this legislation.

The exemption from taxation was one of the inducements held out to persuade the investment of private capital in the enterprise.

In the report of a Committee of the New York Chamber of Commerce to the latter body made in 1894, the Committee said:

"For the reasons stated above (inadequacy of surface and elevated railroads) effective rapid transit construction must now prove

a very costly undertaking, and does not present to capital—which is always more or less timid—sufficient inducements to attract the large sums necessary to insure a complete system of rapid transit development. This is why the Rapid Transit Commission has been unsuccessful in inducing private enterprise to accept any plan that they have recommended in the past two years, nor will they be successful for many years to come, in the opinion of your Committee, unless, in some legitimate way, private enterprise is stimulated" (Appendix, p. 147).

The Board of Rapid Transit Railroad Commissioners memorialized the Legislature in 1899 in the following language:

"The Board, therefore, ventures to urge that if the Legislature shall determine that it is wise to permit a resort to private capital, the largest measure of authority and discretion compatible with the public interest shall be entrusted to the Board in order that it may frame such a franchise as will certainly attract sufficient private capital and arouse competition. *And the Board deems it of especial importance, if private capital is to be enlisted, that the Board may be authorized, in its discretion, to enter into such a contract with the corporation that shall undertake the work as will exempt it from taxation for some limited period, and will insure it for a period of years at least, against the possibility of legislative or municipal interference*" * (Appendix, p. 143).

In an address delivered before the New York Chamber of Commerce in October, 1901, ex-Mayor Abram S. Hewitt, after reviewing the history of

*The italics are ours.

the long unsuccessful efforts to furnish rapid transit to the City, and rejoicing in the fact that, at last, responsible people had undertaken to provide it on the terms of the co-operation of city and private enterprise embodied in Contract No. 1, explained that while under that contract the City furnished the credit necessary to provide funds for the construction of the railway, which was to be its property,

"The capital required is provided at the lowest possible cost, and the work, being executed by the contractors, is also carried on with all the economy which private interest invariably secures. *The only concession which is made to the contracting corporation is immunity from taxation during the life of the lease.*"* This is in fact a concession in theory rather than in practice, because, if the work were not constructed, there would be no property to be taxed. The great object aimed at was to secure the early completion of the work, its continued ownership by the City, and its reversion, at the end of fifty years, to the City, free and clear of all encumbrances of every kind and nature whatever. The coming generation can therefore arrange for the operation of the road, either at cost or, if it be continued on a profitable basis of fare, for a reduction of general taxation. * * *

"It is by no means certain that the contracting company will, for a considerable time, be able to realize any profit from the operations of the railroad, although the outlook is now much more favorable than at the time when the contract was made. The estimate of the profit which was to be made by the contractors out of the enterprise was

*The italics are ours.

purely conjectural, but it is generally agreed by competent men, familiar with great public works, that the terms of the contract are unusually favorable to the City. One thing is certain, that the Rapid Transit System adopted by the Commission will be fully completed and put in operation without involving any additional taxation whatever, and at the end of fifty years, it will be the absolutely unencumbered property of the City. Compared with other enterprises in other cities, it must be conceded that the arrangement made for the construction of this work is the most favorable that has ever been devised or accomplished" (Appendix, pp. 145, 146).

For the purpose of carrying out these intentions, and, in the language of the Board, to exempt any corporation undertaking the work "from taxation for some limited period" by such form of contract as should "insure it for a period of years at least, against the possibility of legislative or municipal interference," the exemption from taxation was expressed in the most general and comprehensive terms. As SMITH, *P. J.*, said in the opinion above referred to, "The language hardly could have been broader." The exemption was made to run with the estate. It attached to "the person, firm or corporation operating such road." It constitutes the covenant of the State that the earnings derived from the operation of the railroad shall be applied, as between the individual or corporation operating such road and the public, in the manner, and only in the manner, stipulated in the contract. The exemption is not from taxation of or upon property; but "*in respect to*" the *interest* of the person, firm or corporation operating the railroad under the contract, and "*in respect to*" the rolling stock

or equipment furnished. Obviously, the principal interest of the lessee under the contract is the right to collect the revenues derived from the operation of the railroad, and a tax on the lessee's capital, all of which is invested in rolling stock and equipment furnished pursuant to the terms of the lease, at a rate of $\frac{1}{4}$ mill for every per cent. of dividends earned on that capital for the year, plus a further tax of one-half of one per centum per annum on the gross earnings derived from the operation of the railroad under the contract (which is the tax levied), is in substance and in fact a tax "*in respect to*" the lessee's interest under said contract, just as much as if it were specifically so described in the tax levy.

Words similar to those employed in this exemption section were used in the Federal Corporation Tax Law of August 5, 1909, making every corporation, etc., subject to pay annually "a special excise tax *with respect to the carrying on* or doing of business by such corporation." This language was held by this Court to impose a tax "upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock associations of the character described," and it was said that as the latter organizations share many benefits of corporate organization, the tax might be described generally "as a tax upon the doing of business in a corporate capacity" (*Flint v. Stone-Tracy Co.*, 220 U. S., 107, at pp. 145, 146).

Franchise taxes under Section 182 of the New York Tax Law are also taxes upon the doing of business in a corporate capacity.

" * * * the tax was upon the privilege of exercising the corporate franchise and of carrying on the business through which the

Company was, by its earnings, to provide for its obligations."

Per GRAY J., in *N. Y. Terminal Co. v. Gaus*, 204 N. Y., 512, 516.

Like the Federal Corporation Tax of 1909,

"* * * the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax measured by the standard prescribed."

Flint v. Stone-Tracy Co., 220 U. S., 107, 150.

McCoach v. Minchill R. R. Co., 228 U. S., 295.

This is also the construction put upon the New York Statutes in

People ex rel. Ft. George Realty Co. v. Miller, 179 N. Y., 49.

People ex rel. Wall & H. St. R. Co. v. Miller, 181 N. Y., 328.

In *People ex rel. Fifth Avenue Co. v. Williams*, 198 N. Y., 238, 242, the Court said:

"From the moment when the relator began to use its money to purchase real estate for the purposes of its incorporation it employed its capital in this State within the purview of the Statute."

Chief Judge CULLEN fell into error when in his dissenting opinion in

People ex rel. Cornell Steamboat Co. v. Sohmer, 206 N. Y., 651,

cited by him in his concurring opinion in the case at bar (Record, p. 95), he said that the tax under Sections 182 and 184 is "exclusively for the privilege of *being* a corporation instead of a partnership."

The tax for *being* or becoming a corporation is imposed as a condition precedent to filing the certificate of incorporation by Section 180 of the Tax Law, and was paid by the plaintiff-in-error upon its incorporation (Record, p. 78). The tax under 182 by its own language is "For the privilege of doing business or exercising its corporate franchises in this State, every corporation * * * *doing business* in the State shall pay," etc.

That under 184 is imposed "for the privilege of exercising its corporate franchises or carrying on its business in such organized or corporate capacity in this State."

The basis of the tax is the capital of the corporation *employed* within the State, and not the whole capital of the corporation.

People ex rel. Vandervoort R. Co. v. Glynn,
194 N. Y., 387.

The exemption agreed upon in the contracts with the City of New York under legislative sanction protects the plaintiff-in-error from taxation for the privilege of carrying out those contracts served on the basis of the capital invested in the equipment of the railways or employed in their operation, or measured by the earnings derived from such operation.

In *New York Central Railroad v. Miller*, 202 U. S., 584, this Court had before it the question of taxation under Section 182 of the Tax Law of 1896.

HOLMES, J., in writing the opinion of the Court, said:

"We are not curious to inquire exactly what kind of a tax this is to be called. If it can be sustained by the name given to it by the local courts, it must be sustained by us. It is called a franchise tax in the Act, but it is a franchise tax measured by property. A tax very like the present was treated as a tax on the property of the corporation in *Delaware, Lackawanna & Western R. R. v. Pennsylvania*, 198 U. S., 341, 353. This seems to be regarded as such a tax by the Court of Appeals in this case" (p. 596).

In *Delaware, etc., R. R. Co. v. Pennsylvania*, 198 U. S., 341, the question under consideration was the right of the State of Pennsylvania to tax the Railroad Company on coal which had been mined and sent by it into other States where it was awaiting sale, under a statute imposing an annual tax upon the actual value of the whole capital stock of all kinds of the corporation. The Court held that it was taking property without due process of law, which would be restrained by the Federal Courts, to so include the coal in the other States. PECKHAM, J., said (p. 357):

"We cannot see the distinction, so far as the question now before the Court is concerned, between a tax assessed upon property *eo nomine*, or specifically, when outside the State, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property, and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the State, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the

extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock, or something else, which represents that property. Such a tax in its nature, by whatever name it may be called, is a tax upon the specific property which gives the added value to the capital stock."

The Legislature so framed the exemption under consideration as to protect the corporation operating the rapid transit railroad from taxation under *any* theory which should affect its interest under the contract, or in the equipment of the road.

It is well settled in this court that a statute which exempts the property of a railroad company from taxation exempts not only the rolling stock and the real estate owned by it, but its franchises also.

Wilmington R. R. Co. v. Reid, 13 Wall., 264.

Pacific Railroad Co. v. Maguire, 87 U. S., 36.

These cases related to what may be called the special or property franchises of the Railroad Companies.

But in *Gulf & Ship Island R. R. Co. v. Hewes*, 183 U. S., 66, it was held that under the principle of *Wilmington R. R. Co. v. Reid*, *supra*, the corporate franchise, or privilege of a railroad corporation to do business in that capacity, is property of the most valuable kind, and is equally with other property within any exemption from taxation which the company may possess. The charter

of the company in that case exempted from taxation the company, "its stock, its railroad and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted." This language, BROWN, *J.*, said, "undoubtedly implies an exemption from privilege as well as *ad valorem* taxes."

"Whatever may have been the fluctuations of opinion upon this subject, and it is not to be denied that there are many cases in the state courts holding that a privilege tax is not a tax on property, the law in this court, *so far as concerns railway franchises*,"* must be deemed to have been settled by the case of *Wilmington R. R. v. Reid*, 13 Wall., 264, in which an exemption in the charter of the Wilmington & Raleigh Railway Company of 'the property of the said company and the shares therein' from taxation, was decided to extend to a tax upon the franchise and rolling stock" (p. 77).

Wright v. Georgia Railroad & Banking Co., 216 U. S., 420, may be distinguished upon the ground that the tax was imposed *upon* income, and therefore upon the special franchise, and therefore is not relied upon in support of the proposition here contended for.

Nichols v. New Haven & Northampton Co., 42 Conn., 103, is nearly on all fours with the case at bar. The language of the exemption in the legislative charter of the Farmington Canal Co. was, "*that the stock and income shall be forever exempt from taxation.*" The exemption was granted for the purpose of influencing public subscription to the capital stock of the Canal Co., and also for the rea-

*The italics are ours.

son that the canal, if completed, would be of great public utility.

That portion of the decision pertinent to the contention of the plaintiff-in-error herein was to the effect that the above quoted exemption was sufficient to take the company out of the operation of a subsequent enactment under which the State Treasurer purported to assess a franchise tax upon the successor of the rights of the Farmington Canal Co. The language of the opinion on that point is as follows (pp. 123-125) :

"We are satisfied that the tax is a tax upon the property of the defendants.

But suppose that it were not so, but is to be regarded as a corporate tax irrespective of the defendant's property, still are the defendants liable to pay the tax in controversy, provided they are entitled to the exemption from taxation, which was originally conferred upon the Farmington Canal Company? * * *

Manifestly this question depends upon the solution of another; which is, *did the immunity of the Farmington Canal Company include its body politic, as well as the property, of the company?** For, obviously, if the immunity extended to the body corporate of the company upon which the tax is assumed to be imposed, then nothing is gained to the State by making the claim that the tax is a corporate tax. The question then is, did the immunity extend to the corporation itself?

Suppose this question had arisen under a similar statute as soon as the stock of the Farmington Canal Company had been taken and the capital paid in under the promise of the State that the stock of the

*The italics are ours.

company and its income up to 6 per cent. upon its capital should be forever free from taxation. What would be thought of the integrity of the State in saying to the stockholders in effect, 'True it is that we promised that the stock and net income of the company up to 6 per cent. upon its capital should never be taxed, in order that the stock of the company might be taken; but we did not promise that the company itself should not be taxed in respect to its stock to the same extent as the stock would have been taxed if no promise had been made'? The State can no more be guilty of fraud in making contracts, and justify itself, than can individuals; and how could it escape from the imputation of bad faith, should it seek to tax the company under such circumstances? A promise made to the stockholders of a company, enures to the benefit of the company; for the stockholders, in fact, are the company. All its property of every name and nature belongs to them; and a tax, therefore, in any form upon the company is a tax, in reality, upon the stockholders of the company. The State knew this when the promise was made. It knew that if the public were told that the promised exemption from taxation related *only to one form of taxation*, but under another form the corporation would be taxed, and that, too, to the same extent as it would otherwise have been taxed if no promise had been made, the stock of the company would never be taken. It knew, therefore, what construction the stockholders must have put upon the promise—that it was a promise of exemption from taxation in every form whatsoever, so far as the stock, and franchise, and property, and the company itself were concerned. Such being the manifest import of the promise, every consideration of justice and honesty requires that it should have

such construction. For, although the promise does not expressly include a tax upon the body politic, still, unless it is included, the State itself cannot show how the stockholders of the company could ever be benefited in the slightest degree by the exemption.

The charter of the company pretends to hold out inducements to persons to subscribe for the stock. It says, 'Whereas, said canal, if completed, would be of great public utility; therefore, for the purpose of inducing persons to subscribe to the stock of said company, be it resolved,' etc. There can be no escape from the conclusion that this language was intended for deception unless the body politic of the company was intended to be included, and was included in the promised exemption from taxation.

It is true that all exemptions from taxation are to be construed strictly in favor of the State and against the grantee; but this principle has never been carried so far as to require courts to be governed by the strict letter of the grant, ignoring its manifest import, or so far as to justify bad faith in the making of such contracts.

It might be claimed with truth that the value of the franchise of a corporation enters into and forms a part of the value of the stock of the corporation. The franchise is valuable in proportion to the yearly net income which the corporation receives and is likely to receive in carrying on its business. The stock of the corporation derives its value to a great extent from the franchise and income together; and in some cases these sources of value double and treble its nominal value. Hence, the value of the stock of a corporation embraces the value of its franchise; and consequently, if the stock is exempt from taxation, so must the

franchise likewise be exempt. *Wilmington R. R. Co. v. Reid*, 13 Wallace, 264."

See also:

State v. Balto. & Ohio R. R. Co., 48 Md., 49.

In *Grand Gulf, etc., R. R. Co. v. Buck*, 53 Miss., 246, the opinion is as follows:

"By the terms of the charter of the plaintiff-in-error, it is declared 'that the capital stock of said company and all other property belonging to or connected with said railroad shall be exempt from all taxation until eight years after said road shall be put in operation.'

The only question presented is whether the Legislature is thereby prohibited before the expiration of the period, from levying a tax designated as a privilege tax, upon the corporation.

We think that the question must manifestly be answered in the affirmative, both upon reason and authority. *Wilmington R. R. v. Reid*, 13 Wallace, 264; *M. & O. R. R. v. Mosely*, 52 Miss., 127."

In *Hancock, Comptroller, v. Singer Mfg. Co.*, 62 N. J. Law, 326, 338, the pertinent part of the opinion (by VAN SYCKEL, J.) is as follows:

"This controversy relates to the imposition of an assessment amounting to the sum of \$4,209.30, levied by the State Board of Assessors for the year 1897, upon the Singer Manufacturing Company, under the Corporation Tax Act of 1884, as amended in 1892 (Gen. Stat., p. 3336, Sec. 260).

It is called a franchise tax and is laid upon the entire capital of the company, less

\$814,000, the assessed value of its real and personal property in this State.

The defendant company is a manufacturing corporation chartered by special act of the Legislature of this State in 1873 with a capital stock of \$10,000,000.

The exemption of the company from liability to this tax rests upon the provisions contained in the sixth section of its charter, which reads as follows:

'That whenever five hundred thousand dollars shall have been paid in said corporation may organize and proceed to business under this act and shall immediately thereafter file with the Secretary of State of this State a certificate of such payment, and organization, whereupon and not until then, shall this act take effect; and if and so long as the said corporation shall invest and keep invested in real estate within this State the sum of five hundred thousand dollars, the real and personal property of the said corporation not actually in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders shall not be liable to any tax or impost whatsoever. * * *

The question to be solved is whether the sixth section of the charter of this company constitutes an irrepealable contract with the State, and if it does, whether the imposition of this tax violates the contract. The sixth section contains all the elements of a contract. There are present a subject-matter, parties and a consideration. On the one side is a complete performance, and on the other, acceptance. * * *

When a contract is made the good faith of the State must be preserved and the contract performed according to a reasonable and just interpretation of it.

The company was induced to remove its

works from the State of New York and to erect a large and expensive factory in this State by this agreement to limit the power of the State to subject it to taxation, and it will be derogatory to the State to resort to any subterfuge or narrow and sharp construction in order to evade the effect of the contract. * * *

The imposition resisted by the company in this case is laid upon the entire capital stock of the company of ten million dollars, less the value of its real and personal property in this State, and is in effect as much an impost on property out of this State as if it was put directly upon the property itself, and not upon the capital which stands for and represents it. It is an attempt to accomplish by indirection what it is stipulated shall not be done. It is an effort to levy a franchise tax out of the many millions of dollars of its capital invested by the company in real and personal property outside of this State. * * * It is wholly immaterial what name may be given to it. The fact that it is called a 'license fee' or 'franchise tax' cannot validate it. It is levied under an act passed 'to authorize the imposition of State taxes' and it is none the less an interdicted imposition and none the less a tax because it is given a new name.

Although under our adjudications, it is not a tax on property in a sense which brings it within Article 4, Section 7, Paragraph 12, of our State Constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object and the State would be deprived of all its revenue under the Act of 1892. *The franchise of the company is the right to hold property and exercise its corporate privileges.** The Supreme

*The italics are ours.

Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise (*Wilmington R. R. v. Reid*, 13 Wall., 264).

It is manifest that both the Legislature, when it granted the charter, and the company to which it was granted, understood from the prior decisions of our courts, that the exempting language was intended to secure exemption from a franchise tax. To affirm the contrary is to assert that the language of the contract was used in a sense the opposite of that which both parties are presumed to have known was its declared and accepted meaning in the law."

This language applies exactly to the position of the State of New York with respect to plaintiff-in-error, taken at the suggestion of the Court of Appeals and affirmed by it.

In *Worth v. Wilmington & Weldon R. R. Co.*, 89 No. Carolina, 291, the Court construed a revenue act passed by the North Carolina Legislature of 1876-1877, which sought to tax in one way or another, all corporations which had become vested with some kind of an exemption from taxation. The statute itself was an attempt on the part of the Legislature to repudiate its prior contracts made with these different companies, and the Court held it unconstitutional on two grounds: First, that it was in violation of the requirement as to uniform taxation, and, second, because it constituted an impairment of the respective contracts. The exemption which was vested in the Railroad Company by its charter was as follows:

"All the property purchased by the said president and directors, and that which may

be given to the said company, and the works constructed under the authority of this act, and all profits accruing on said works, and the said property, shall be vested in the respective shareholders of the company and their successors and assigns forever, in proportion to their respective shares, and the shares shall be deemed personal property; and the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever."

The Court (SMITH, P. J.) said (pp. 296-298) :

"But aside from the operation of the provisions of the Constitution of the State, we are confronted with the inquiry whether the terms of the exemption in the recited clause of the charter are not a protection against either of the forms of taxation adopted in the revenue law. Its language is certainly very broad and comprehensive, declaring, after an enumeration of all property obtained by purchase or gift, the works constructed and all profits accruing thereon which are to vest in the shareholders, 'that the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever.'

We are not left in doubt as to the construction of this clause as it has been before the Supreme Court of the United States and its force and effect as a contract determined. *Wilmington R. R. Co. v. Reid*, 13 Wall., 266.
• • •

The only portion of the law which can have application is that which exacts a tax laid upon the corporation whose measure is the one-hundredth part of the gross receipts of the company.

If this be a tax on the corporation as an entity, it must be in the nature of a *capitation tax* or a tax upon the exercise of its cor-

porate functions, in analogy to that required of natural persons in pursuing some employment or avocation. In the latter case, the tax is upon the use of its corporate franchises. That is upon the corporate franchises which are exercised, and this, the decision affirms, is a violation of the contract of exemption. If the tax be upon the gross receipts, not upon the exercise of its franchises by which they are earned as a fund accumulated thereby, it is most clearly a tax upon personal property owned and undistributed. When divided among the shareholders and entering into the bulk of their respective estates, it ceases to be the property of the corporation, and loses the privilege it before possessed as corporate funds."

See also in the same volume:

Worth v. Petersburg R. R. Co., 89 No. Carolina, 301.

Home Ins. Co. v. N. Y., 134 U. S., 594, to the effect that a corporation *properly subject to a franchise tax* cannot claim any reduction in the tax because part or all of its capital is invested in exempt property, and similar cases, are not in conflict with the cases above cited in their application to the case at bar. There was no question of legislative exemption contract in the *Home Insurance* case. The cases above cited are upon the correctness of the construction of legislation expressly exempting from taxation. They may be summed up as establishing the principle that when the Legislature holds out an exemption as an inducement to the making of a contract and the expending of large sums of money in a public work, it will not be presumed that it intended to take

away with one hand what it for a consideration gave with the other.

Plaintiff-in-error does not contend that the exemption clause in the Rapid Transit Act protects it from all taxation upon its franchise or right to carry on business in its corporate capacity.

It concedes the correctness of the construction given in the Court of Appeals to Section 185 of the Tax Law in holding it liable to such a tax, measured by its earnings derived from its operation of the *elevated* railroads under lease from the Manhattan Railway Company. But it denies the right of the State under the guise of a tax upon its right to carry on business in a corporate capacity, to levy upon its earnings from the rapid transit railways operated by it under a contract which exempts it from taxation in respect to its interest thereunder, and in respect to the rolling stock and equipment thereof (Record, pp. 26, 29).

In this respect, the case is analogous to that of other railroad companies exempted from taxation by their original charters, but which, at later periods, constructed extensions under legislative authority without immunity from taxation, or consolidated with other corporations which were not exempted from taxation. In such cases, the courts have sustained the inviolability of the contract for exemption as to the original road, while upholding the tax as to the extension or road consolidated.

See *Wilmington and Weldon R. R. Co. v. Alsbrook*, 146 U. S., 279.

The case of

Central R. R., etc., Co. v. Georgia, 92 U. S., 655,

goes even further, in holding that where two railway companies, one vested with a contractual limitation as to the amount of taxation, and the other not, consolidated under an enabling act of the Georgia Legislature, the contractual rights vested in the first company were not forfeited.

The Court of Appeals followed the analogy of these cases, to a certain extent, when it held plaintiff-in-error to be subject to tax upon its franchise or right to carry on its corporate business under Section 185 of the Tax Law, in respect of, but only in respect of the income derived by it from the operation of the *elevated* railroads. The Court erred, when it failed to hold, that while generally subject to taxation upon its franchise or right to carry on business in corporate form, plaintiff-in-error was expressly exempted by the Rapid Transit Act, and the contracts made by its authority with the City of New York, from taxation under any form or pretense, directly or indirectly, upon, or measured by, its interest in the rapid transit railways, so long as it was engaged in their operation.

II.

The Legislature and the parties to the contract understood and intended that contracts under the Rapid Transit Act should be made between the City and a corporation, and that the exemption clause should protect the latter from any form of taxation which should affect its interest under such contracts.

“Legislative contracts, especially, should be read in the light of the public policy en-

tertaind, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail. In *Platt v. Union Pacific Railroad*, Mr. Justice STRONG expresses this proposition as follows: 'There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.' "

Mobile & Ohio Railroad v. Tennessee, 153 U. S., 486, 502.

The Court of Appeals of the State of New York in the case at bar has held that despite the comprehensive exemption from taxation in the Rapid Transit Act and in the contracts of the plaintiff-in-error with the City of New York, the former is subject to taxation for the privilege of doing business or exercising its corporate franchises in the State, and that such tax may be computed upon the basis of the amount of its capital employed within the State, including that invested in the railways leased by it from the City, and upon its gross earnings derived from the operation thereof. This ruling is based upon the Tax Law of 1909. As was observed by SMITH, *P. J.*, in his dissenting opinion above referred to, before the passage of the immunity statute, "it had become a part of the policy of the State to tax franchises of corporations. If it had been intended in this Act"—*i. e.*, the Rapid

Transit Act—"to reserve the right to the State to tax this franchise, in fairness to the investors whose bids were sought, that should have been stated in this statute" (Record, p. 100).

The Court of Appeals in the opinion in 200 N. Y., 93, said:

"Two steps were necessary before the relator could enter upon the equipment and operation of the railroad. The first of these was its creation through incorporation, and the second was the procuring and execution of the contracts for equipment and operation with resulting rights and obligations thereunder. While doubtless the first was taken with express reference to the second, the two were entirely separable and distinct, and there was no difficulty if the Legislature saw fit in exempting relator from taxation 'in respect to * * * its interest under said contract and in respect to the rolling stock and all other equipment of said road' without exempting it from taxation, because of privileges and advantages which it enjoyed through corporate existence in securing and carrying out the contracts under which it enjoyed the 'interest' mentioned, and this is what it did" (Record, pp. 82, 83).

If this subtle and adroit means of destroying the exemption conferred by the contract had been written into the invitation to bidders at the time the City of New York was seeking responsible capitalists to undertake the equipment and operation of its subways, it is safe to say the solution of the problem of rapid transit in New York would have been postponed for a considerable period.

Judge KELLOGG, in writing the majority opinion in the Appellate Division (138 App. Div., 612), ex-

pressed a much more just and accurate view. He said:

"The relator is exempt from taxation in respect to anything it does pursuant to the contract with the City under which the subway was constructed and is operated. * * * The statutory exemption should be given a fair construction in order to carry out the real purpose for which it was allowed. The exemption from taxation was an inducement which led to the construction and operation of the subway, and should be fairly observed" (Record, p. 97).

When the Legislature enacted the clause conferring exemption from taxation upon such person, firm or corporation as should enter into contract with the City and engage in the operation of a rapid transit railroad constructed under the Act of 1891, there were in force in the State of New York, statutes imposing annual taxes upon corporations organized or formed under, by or pursuant to law within this State, measured by the amount of capital employed within the State (Laws 1880, Chapter 542, as amended by Laws 1881, Chapter 361), which had been construed by the Courts of the State and by this Court to impose a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity; and therefore, it had been held that the fact that part of the property of such corporations was invested in United States bonds, which are not taxable, did not make invalid a tax imposed upon the corporation measured by the amount of its capital.

Home Ins. Co. v. New York, 134 U. S.,
594.

In other words, the tax was not imposed upon the *capital*, but *upon* the franchise, and *in respect to* the capital employed by the corporation within the State; and when the Legislature of New York enacted the clause tendering an exemption to a contractor for the construction, maintenance and operation of a rapid transit railroad to be built at the expense of the City, it used language broad enough to exempt such a contractor, whether person, firm or corporation, from that form of taxation, as well as from any other, so far as his or its interest in the contract, and in the equipment of the railroad, was concerned. The practical construction given to this provision by the Legislature and by the City confirms this view.

As SMITH, *P. J.*, says in his dissenting opinion referred to:

After the passage of the exemption statute, "and by Chapter 908 of the Laws of 1896 (Gen. Laws, Chap. 24), Section 185 of the Tax Law was enacted so as to tax the gross earnings of elevated and surface roads not operated by steam. This section of the Tax Law has been amended by Chapter 474 of the Laws of 1906 and revised into Section 185 of the present Tax Law (Consol. Laws, Chap. 60; Laws 1909, Chap. 62). This statute gave no authority to lay this tax upon any road constructed under the Rapid Transit Act, under which this relator's road was built. This would seem to be a clear recognition by the Legislature of the immunity from all taxation granted by Section 35 of the Rapid Transit Act, and constitutes, I submit, a legislative construction of that Act" (Record, p. 100).

The State argued in the State Courts, and will doubtless contend here, as the Court of Appeals

in its opinion held, that inasmuch as McDonald, an individual, was the original contractor under Contract No. 1, when the operating part of his contract was assigned, the plaintiff-in-error, in order to take such assignment, had to secure its corporate existence and rights from the State, subject to such terms as the State chose to prescribe; that one of those conditions was the liability to pay a tax for the privilege of carrying on its business in such corporate capacity, and that those conditions in no way conflict with the exemption under the subway contract.

But while the Rapid Transit Act permitted an individual to enter into a contract with the City to construct a railway, it also contemplated such construction by a corporation. The requirement of security in so large an amount as was specified in Contract No. 1—\$5,000,000—led to the making of the contract in terms with McDonald, and the execution of his bond to secure construction, in the sum of \$5,000,000, by Rapid Transit Subway Construction Company, a business corporation especially formed for the purpose, and which itself later contracted with the City for the construction of the Brooklyn extension (Contract No. 2). But from the inception of the enterprise it was contemplated that the railway when completed should be operated by a corporation, and as soon as Contract No. 1 was made, and the work of construction began, steps were taken to secure legislation necessary to carry out that intention.

The statement of facts (*supra*, pp. 7-8) sets forth the terms of the legislation enacted in 1902 to permit the formation of a corporation for the purpose of undertaking the equipment and operation of the railway under construction by McDonald, and similar railways under like contracts, and to author-

ize the assignment of the lease or operating parts of such contracts, separately from the provisions for the construction of the railways; the incorporation of plaintiff-in-error with the written approval of the Board of Rapid Transit Railroad Commissioners, and the assignment to it with like approval of the lease or operating parts of Contracts Nos. 1 and 2.

On Thursday, October 27, 1904, a portion of the subway extending from 145th Street and Broadway to the Brooklyn Bridge was formally opened for operation, and since that date has been operated by Interborough Rapid Transit Company as lessee thereof pursuant to the contract above referred to. Subsequently the additional parts of the railroad constructed under Contracts No. 1 and No. 2 have been opened for operation, and plaintiff-in-error continuously has been and is now engaged in the operation thereof under and pursuant to said contracts.

That the City authorities understood that the exemption was as broad as is claimed by the plaintiff-in-error is shown by the history of its repeal in 1905 as affecting future contracts for rapid transit railway construction.

The enterprises under Contracts Nos. 1 and 2 proved to be successful from the outset, and it at once became obvious that the construction of underground railways operated by electrical motive power furnished a solution of the problem of rapid transit in the City of New York. In a communication from Mayor Low to the President of the Board of Rapid Transit Railroad Commissioners, dated May 12, 1903, after reviewing the progress which had been made towards providing rapid transit facilities for the City of New York, and particularly

referring to Contracts Nos. 1 and 2, above mentioned, the Mayor said:

"The Comptroller suggests that the freedom from taxation, which was originally thought necessary, is no longer either necessary, or permissible. He also proposes that the City should be authorized to construct the subway on its own account and to lease it when constructed to whom it will. So far as the question of taxation is concerned, I am inclined to agree with the Comptroller * * *. In the matter of taxation I have this suggestion to make:

"The power houses are already subject to taxation like other real estate; that which is not taxed is the franchise and the rolling stock, and what we called the interior equipment of the subway. * * *"

See Report, Board of Rapid Transit Railroad Commissioners, City of New York, for 1903, page 20.

On April 28, 1904, the Committee on Plans reported to the full Board as follows:

"In one respect, legislation will be necessary in order to enable the Board to make such a contract as this Committee would recommend. Your Committee is strongly of the opinion that the statutory exemption of the contractor from taxation with respect to his interest under the contract, and in respect to the rolling stock and other equipment of the road, should no longer be allowed. This exemption was not part of the original rapid transit scheme, and was necessarily inserted in order to make the arrangement more attractive to possible bidders, at a time when without it, it seemed impossible to get a bidder * * *."

See Report, Board of Rapid Transit Commissioners for 1904, page 17.

These recommendations bore fruit in the enactment, in 1905, of an amendment repealing the exemption provision, but adding the following clause:

"Nothing in this Act contained shall be held to repeal, modify or alter any provisions of the Act hereby amended, with respect to any railroad or railroads constructed, constructing or contracted for thereunder when this Act takes effect; but the Act hereby amended shall be and continue in full force and effect in respect to such railway or railways so constructed, constructing or contracted for, as if this Act had not been passed."

III.

The contract for exemption, binding upon the State in favor of the original contractors in Contracts Nos. 1 and 2 respectively from the date of their execution, enured to the benefit of the plaintiff-in-error upon the assignment to it of those contracts pursuant to the provisions of the amending act of 1902, and became operative from and after the commencement of operation by it of the railways constructed under said respective contracts.

The contract of exemption with respect to the railroad embraced in Contract No. 1 became complete and binding on February 21, 1900, when that contract was entered into. By that contract, the

City of New York covenanted with McDonald that "the contractor"—words which the contract defined to mean "the party of the second part to this contract, and his executors, administrators and assigns, and any and every person or corporation who or which shall at any time be liable in the place or for the party of the second part to perform any obligations under this contract assumed by the said party of the second part" (Exhibit 1, p. 5), "shall be exempt from taxation under the laws of the State of New York in respect to its interest in the railroad under the contract, and in respect to the rolling stock and all other equipment of the railroad in the manner and to the extent provided in the Rapid Transit Statute" (see also Exhibit 2, p. 5).

When McDonald, under the authority of the amending act of 1902, and with the written consent of the Rapid Transit Board, assigned the lease part of the contract to the Interborough Rapid Transit Company, which assumed the obligation to furnish the equipment, and, by separate agreement with him and the City, guaranteed the performance by McDonald of his contract to construct the railroad, the plaintiff-in-error became entitled to the same exemption from taxation to which McDonald was entitled.

The exemption in Contract No. 1 therefore depends for its effect as a legislative contract upon the laws in force on February 21, 1900.

The exemption contained in Contract No. 2 was in the same language as that employed in Contract No. 1, except that it was provided that no equipment not provided under that contract with the approval of the Board should be exempt.

The exemption in Contract No. 2 therefore depends for its effect as a legislative contract upon

the laws in force on the day of its execution, September 11, 1902. There is no material difference between the state of the law affecting the subject on these two dates, except that it may be pertinent to note that by the amending act of April 23, 1900 (Chap. 616), the Legislature somewhat broadened the definition of the equipment to be furnished by the contractor under such a contract, and reenacted the provisions exempting the person, firm or corporation operating such road from taxation.

IV.

Until the effort to tax plaintiff-in-error on its franchises, under the Consolidated Laws of 1909 (Chapter 62), the decisions of the Courts uniformly sustained its claim of immunity under the contracts and statutes above cited.

Almost immediately upon the commencement of operation of the railroad, and the demonstration of its great pecuniary success, the public authorities began a series of attempts to evade the exemption from taxation agreed upon. The first attempt was made by the State authorities, under the provisions of the Act of 1899 (Chap. 712) for the taxation of the special franchises of railroad companies. The interest of plaintiff-in-error in the railways constructed for the City was assessed as a special franchise or right to maintain and operate a railroad in the public streets. The Court however held that as these railways were the property of the City of New York, a municipal corporation, and expressly exempt from taxation under Section 4 of the General Tax Law; that if taxable un-

der that law the railways and the franchises relating thereto were taxable to the owner, the City, and not to the tenant or operator, and that it would seem necessarily to follow that if the owner were exempt from taxation, the tenant or occupant must also be exempt. But the Court said the Legislature had not left the question open as one of construction or inference, but by express provision had extended the exemption to the operator or lessee of the City, quoting Section 35 of the Rapid Transit Act. This exemption, it continued,

“was undoubtedly intended to make the proposed contract for operation and the lease attractive, and to aid the City in securing a proper contract for the operation of the road at a profit to it.”

After reviewing the statutes, the Court concluded thus:

“The entire legislation upon the subject seems to be consistent only with the theory that the operator is not liable for any tax on account of the rights it holds under the contract. It is not, therefore, liable for any special franchise tax.”

People ex rel. Interborough R. T. Co. v. Tax Commissioners, 126 App. Div., 610; aff'd without opinion, 195 N. Y., 618.

The City of New York thereupon proceeded to assess plaintiff-in-error for the year 1905, upon the real estate on which it had erected power houses, and the machinery installed therein for the generation and supply of electrical power for use in operating the rapid transit railway. Upon a review of that assessment, the Court of Appeals held that the exception to the exemption conferred by Section 35

of the Rapid Transit Act only left liable to taxation the land and the buildings erected thereon, and that plaintiff-in-error, as the assignee of the contract for maintenance, was not liable to taxation upon the machinery and apparatus installed within the power houses. In the course of the opinion (*People ex rel. Interborough R. T. Co. v. O'Donnell*, 202 N. Y., 313, 321), HISCOCK, J., said:

"Of course, I do not lose sight of the principle that taxation is the rule, rather than the exception; that under ordinary circumstances a statute claimed to give an exemption should be construed strictly against the one claiming benefits thereunder. As I conceive it, however, that general principle plays a small part in this case. In the first place, this is not a case of an exemption as a gratuity. The statute of which Section 35 is a part provided for a contract between the City of New York and whoever should be willing to undertake it on the other side, for the construction and operation of the subway roads. It provided for the imposition upon the contractor of onerous obligations on the one hand, and for rights and the possibility of profits on the other, and this exemption from taxation was not a gratuity but one of the provisions to be incorporated in the contract as an inducement to those who might consider undertaking the contract. Furthermore, there is no dispute that the Legislature intended to and did make some exemption. The only question is the extent of that exemption, and this in turn is dependent upon the further query how far a general clause is to be curtailed by a proviso or exception. Under these circumstances, no rule requires us to discriminate against the relator or do otherwise than give to the statute that fair and reasonable interpretation which it seems must have

been within the contemplation of the parties."

In 1903, plaintiff-in-error, in the exercise of powers conferred upon it by the General Railroad Law, leased the elevated railways of the City of New York from the Manhattan Elevated Railway Company, and entered upon the operation of those roads, pursuant to such lease. In the revised Tax Law of 1906, Chapter 474, there is a section (185) to the effect that every corporation operating any elevated railroad shall pay to the State for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax of one per cent. upon its gross earnings from all sources within this State, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by any such corporation. This section was carried into the Consolidated Tax Law of 1909 (Chap. 62). The State taxing authorities, under color of this law, imposed upon plaintiff-in-error a tax for the years 1907, 1908 and 1909, assessing the tax for each of those years at one per cent. upon its gross earnings derived not only from its elevated railways operated under lease from the Manhattan Railway Company, but from the rapid transit railways operated by it under contract with the City as well; and also three per cent. upon the amount of all of its dividends declared or paid in excess of four per cent. upon the actual amount of its paid-up capital, all of which capital it appeared was employed in the equipment of the said rapid transit railways. Upon *certiorari* to review these assessments, a majority of the Appellate Division of the Supreme Court gave to the statute above

referred to a literal interpretation, and held the company to be taxable with respect to *all* of its earnings, both from the elevated roads and the rapid transit railways, upon the ground that the tax was not imposed upon the earnings or property, but for the privilege of exercising a corporate franchise in carrying on the business; that the fact that the relator, with reference to the rapid transit railway or subway, was exempt from taxation, except as to the real estate owned or employed by it, did not permit the Court, in ascertaining the gross benefits of the company from all sources, to eliminate the earnings of the subway; that the earnings were used simply as a method of determining what the use of the franchise was worth, a measure solely to determine how much tax should be paid upon the franchise (Record, pp. 97-98). The Court, however, held that the tax upon the surplus dividends was, in effect, upon the actual amount of paid-up capital "employed" by the corporation, and that this meant employed by the corporation in the ownership or operation of the elevated roads, and it appearing that none of the paid-up capital of the relator was so employed, it was not liable to this particular tax. There was a vigorous dissent by two of the Judges from this decision. The dissenting opinion of SMITH, *P. J.*, has been several times referred to. He held that the exemption in the contract with the City was broad enough to protect the contracting company from this form of taxation, as well as from all other; that the statute by fair intendment not only exempted the property, but guaranteed immunity to the company operating the road from all taxation, which included the franchise tax as well.

On appeal, the Court of Appeals reversed the

decision of the Appellate Division, holding that the literal construction of the statute was improper; that the general words in the statute "from all sources," used in describing the gross receipts, made the basis for fixing the amount of the assessment, should be interpreted to carry out what must have been the intention of the Legislature, namely, that those earnings should be derived from the elevated railroads with respect of which the tax was imposed. The Court, however, differed with the Appellate Division in its construction of the exemption clause in the Rapid Transit Act, and expressed its opinion that that provision was not broad enough to exempt the contracting company from the payment of any franchise tax in its subway operations, and it concluded that although the company was not assessable in respect to its rapid transit or subway roads under Section 185 of the Tax Law, it saw no reason to doubt that within Sections 182 and 184 of the Tax Law (of 1909) there were provisions broad enough to provide for a franchise tax against the relator

"in respect of its equipment, maintenance and operation of the subway roads,"

despite the provision in the exemption statute that such corporation operating a rapid transit railway

"shall be exempt from taxation in respect to his, their, or its interest under said contract, and in respect to the rolling stock and all other equipment of said road."

Entertaining these views, the Court thereupon remitted the matter to the State Comptroller for a new assessment.

The Comptroller thereupon proceeded to assess the plaintiff-in-error under Sections 182 and 184

of the Tax Law of 1909, for the period beginning July 1, 1906, and ending June 30, 1909, on the basis of its entire capital stock, viz., \$35,000,000 (all of which was invested in the equipment of the rapid transit railways), at the rate of $\frac{1}{4}$ mill for each per cent. of dividend declared on said stock, and a further tax of one-half of one per cent. on its gross earnings for each of said years derived from its operation of said railways under lease from the City, as well as one per cent. on the gross earnings derived from its operation of the elevated railways (see Record, pp. 60, 62). On *certiorari* to review this assessment, the Appellate Division of the Supreme Court, and the Court of Appeals confirmed the determination of the Comptroller, the latter Court holding that the law was concluded by its former opinion, and that because Sections 182 and 184 of the Tax Law impose a tax upon every corporation doing business in this State, "for the privilege of doing business or exercising corporate franchises in this State," the exemption provision above referred to was not a protection from the imposition of a tax upon the gross earnings derived from the operation of the rapid transit railway, which, in effect, constituted the measure of "its interest in" said road (Record, p. 92).

V.

The literal construction given by the Court of Appeals to the provisions of Sections 182 and 184 of the Consolidated Tax Law of 1909 is as erroneous as was the literal construction of Section 185, which was condemned by that Court; but if such construction is sound, or binding upon this Court, the statute is void as against plaintiff-in-error, because it impairs the obligation of the contracts exempting it from taxation in respect to its interests under those contracts.

It is safe to say that nobody ever thought plaintiff-in-error was subject to a franchise tax based upon its investment in the equipment of the City's rapid transit railways, or the earnings derived from their operation, until it was suggested in the opinion of the Court of Appeals in this case (Record, p. 80).

There was much force in the contention of the State Comptroller, sustained by a majority of the Appellate Division, that by taking a lease of the elevated railways, plaintiff-in-error had brought itself within the language of Section 185, which imposed upon "every corporation * * * operating any elevated railroad * * * for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity * * *" an annual tax of one per centum "upon its gross earnings from all sources within this State," besides three per cent. upon the amount of dividends declared or paid in excess of four per cent. "upon the actual amount of paid-up capital employed by any such corporation."

The Court of Appeals, however, very properly rejected the literal construction of that section, holding that the Legislature could not have intended to tax such a corporation upon more than the gross earnings derived from the operation of the elevated railways and the excess dividends earned upon capital employed in those railways.

But it entirely disregarded the intent of the Legislature as shown in the history of the exemption from taxation of corporations operating rapid transit railways under contract with the City, and held plaintiff-in-error liable to taxation under Section 182 as a "corporation organized or formed under, by or pursuant to law in this State," on the basis of the amount of its capital stock employed within the State, and under Section 184 as a "transportation corporation" for an annual excise or license tax upon "its gross earnings from its transportation * * * business"—including those derived under the contracts with the City—in the face of the express legislative and contractual exemption of all taxation "in respect to" "its interest under said contract, and in respect to the rolling stock and all other equipment of said road," in which its entire capital of \$35,000,000 is invested.

If "gross earnings from all sources" in Section 185 means gross earnings from the operation of elevated railroads only, and dividends "upon the amount of paid-up capital employed by any such corporation" means capital employed in elevated railroads only, why does not "capital stock employed within this State," in Section 182, mean only capital employed in railways with respect of which the company is not expressly exempted from taxation, and "gross earnings from its transportation business" in Section 184, mean gross earnings from railways except those owned

by municipalities, and therefore exempt from all taxation to the owner, and except also earnings derived under a contract with such owner which expressly exempts the operating company from taxation with respect of its interest thereunder?

Why should the construction give effect to the assumed legislative intent not to impose double taxation in the one case, and stick in the bark at carrying out a contract for exemption held out to induce investment of vast private capital in the other?

The effect of such taxation in impairing the obligation of the contracts with the City will be obvious upon an examination of the terms of the contracts.

By the leasing part of Contract No. 1 the railroad is demised by the City to the contractor for the term of fifty years, with the right to a renewal for a further period of twenty-five years, for a rental to consist of:

1. An annual sum equal to the annual interest payable by the City upon all bonds which shall be issued by it in order to provide means for construction.
2. A further annual sum equal to one per centum upon the whole amount of said bonds—with certain exceptions not material to this discussion.

The rental under Contract No. 2 for the lease, which runs for thirty-five years with the right to a renewal for the further period of twenty-five years, is on the same basis as that under Contract No. 1, except that in addition there is required to be paid to the City a further annual sum which shall be equal to the amount of the annual interest payable by the City upon bonds issued to provide means to

pay for rights of way acquired on, under, through or over lands not belonging to the City.

It is evident that if the State, under the guise of taxing the company on its right to carry on business in its corporate capacity, can take one per cent. per annum of the revenues derived from the operation of the railways under this lease, it can take ten or any other per cent. If it can tax the capital invested by the lessee in the equipment of these railways pursuant to its contracts with the City, and the earnings derived from their operation, it can completely alter the terms of the contracts in faith of which millions of dollars have been invested, and make of the exemption from taxation held out by the Legislature as an inducement to this great investment a mere delusion and snare.

The case is clearly distinguishable from *New York ex rel. Metropolitan Street Ry. Co. v. Tax Commissioners*, 199 U. S., 1, where the relator, having purchased the right to construct a street railway in certain streets in the City of New York at public auction as the bidder who had agreed to give to the City the largest percentage per annum of the gross receipts of said company, was held not protected from taxation by the State upon its special franchise or right to construct, maintain and operate its railways in the public streets, because the contracts contained no express relinquishment of the right of taxation. "All that can be extracted from the language used," said this Court, "was a grant of privileges and a payment therefor. Other words must be written into the contract before there can be found any relinquishment of the right of taxation."

Such other words are written in the contracts at bar, and written in clear and unmistakable terms.

The language of Mr. Justice WAYNE in *Gordon v. Appeal Tax Court*, 3 How., 133, 145, quoted in the opinion in the last-mentioned case (p. 40), is applicable here:

"Such a contract is a limitation upon the taxing power of the Legislature making it, and upon succeeding Legislatures, to impose any further tax upon the franchise."

VI.

The impairment of the obligation of its contracts which exempt it from taxation, complained of by plaintiff-in-error, is occasioned by the construction given by the State Courts of New York to statutes enacted subsequently to the acts of the Legislature authorizing such contracts of exemption, and statutes enacted subsequently to the making of said contracts.

That this Court will determine for itself the existence of the contract relied upon, and whether its obligation has been impaired by the action of the State is too well settled to require argument. See *i. a.*

Northern Pacific Ry. Co. v. State of Minn.,
208 U. S., 583.

Yazoo, etc., Railroad Co. v. Thomas, 132
U. S., 174.

The assessments sought to be reviewed were based on the provisions of the revised tax law of 1909, being Chapter 60 of the Consolidated Laws. (See

Record, pp. 19-22, 23, 25, 60-61; Opinion, WERNER, C. J., pp. 93-95.)

HISCOCK, J., in his opinion on the first appeal to the Court of Appeals, says:

"* * * if we concede for present purposes that the general argument of counsel for exemption has force, it was one to be addressed to the Legislature, *and it is possible that if the present statutes providing for assessments of franchises had been fully foreseen and considered, the exemption clause would have been made broader*"* (Record, p. 83).

The exemption section in the Rapid Transit Act as it was embodied in Contract No. 1 was enacted in the Amendments approved May 19, 1896 (Appendix, p. 75). At the same session of the Legislature a new and revised tax law was passed which was approved May 27, 1896 (Appendix, p. 124).

By an act amending the Rapid Transit Act, approved April 23, 1900, the exemption section was re-enacted (Appendix, pp. 103-104).

After the passage of that act, and after contract No. 1 was executed, Section 182 of the Tax Law of 1896 was amended by an act approved April 26, 1901; and after Contract No. 2 was executed, and the leasing parts of both contracts had been assigned to plaintiff-in-error, Sections 182, 183, 185 and 190 of the Tax Law of 1896 were revised and amended by an act approved May 16, 1906 (Appendix, p. 130); Sections 182, 184, 186, 190 and 195 were amended by an Act approved July 25,

*c. f. SMITH, P. J., "The language hardly could have been broader" (Record, p. 100).

1907 (Appendix, p. 133), and in 1909 a new revision of the entire tax law was adopted as Chapter 60 of the Consolidated Laws (Appendix, p. 138), under whose provisions the tax has been imposed which plaintiff-in-error claims impairs the obligation of its contracts of exemption.

The Act of 1906, "materially changed the method of assessing the tax. * * * The tax on foreign and domestic corporations alike is now assessed upon such a proportion of the issued capital stock as the assets within the State bear to the entire assets."

Note to Birdseye's Cumming & Gilbert's
Consol. Laws of N. Y., Vol. V, p. 5950.
Compare Laws of 1896 (Appendix, p. 124)
and Laws 1906 (Appendix, p. 130).

See

People ex rel. N. Y. M. & N. T. Co. v. Gaus,
198 N. Y., 250,

and especially dissenting opinion of VANN, J.,
passim:

"The radical change of 1906 in rate
method and principle. * * *"

But whether the change be radical or not, the decision of the State court is based on the new statute, and this Court will look to see if thereby a contract is impaired.

In *Yazoo, etc., R. R. v. Thomas*, 132 U. S., 174, 184, the plaintiff-in-error was given by its charter, which became a law on February 17, 1882, a certain exemption from taxation. In 1888, the Legislature passed an Act for the collection of taxes for past

years, which by its terms was not applicable to railroad companies exempt by law or charter from taxation. The Supreme Court of the State held that the plaintiff was not entitled to the benefit of the exemption named in the Act of 1888. The jurisdiction of this Court to review that judgment was challenged. The Court, by the Chief Justice (FULLER), said (p. 184) :

“Although by the terms of the Act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the Act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the Act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter rather than itself imposing taxes, for if the contract existed those laws became inoperative and would be reinstated by the Act of 1888. The motion to dismiss the writ is, therefore, overruled.”

Cited and followed in

McCullough v. Virginia, 172 U. S., 102.

Muhlker v. New York & Harlem Railroad Co., 197 U. S., 544, was a writ or error to review the judgment of the New York Court holding that the New York & Harlem Railroad Company was not liable to the owner of property abutting on Fourth Avenue for damages as for an appropriation of his easement of light and air, arising out of the

elevation of its tracks and the construction of a permanent elevated structure in front of his premises, pursuant to a statute enacted in 1892. The plaintiff had bought his property in 1888. In this Court, plaintiff contended that certain grants of the property made to his predecessors in title constituted contracts, the obligation of which precluded the erection of an elevated railroad in Fourth Avenue; that the erection of a viaduct structure in that street so interfered with his easements as to constitute a taking of his property for a public use, which could only be done by making compensation.

The railroad had been constructed in front of plaintiff's premises under authority of legislation, long antedating his purchase.

The Act of 1892 changed the grade of the railroad in Park Avenue, and required the adaptation of the viaduct structure to the new grade line, the removal of bridges, the widening of the tracks, and construction in accordance with plans to be adopted as specified in the statute, the expense of the improvement to be borne equally by the railroad company and the City, and the cost to the City of the improvement to be assessed to the owners of property in an area of assessment to be fixed in accordance with the provisions of the act.

This Court held that the decisions by the State Courts in the Elevated Railroad Cases, holding that the owner of property abutting on a highway was entitled to an easement of light and air over the highway, which easement was appropriated or taken by the erection of a solid viaduct structure in the highway, and which could not lawfully be taken without making compensation to him, constituted a rule of property which a purchaser of

such property was entitled to rely upon, and that the power of the Courts of New York, to change or modify their decisions "cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."

"And we determine for ourselves," said Mr. Justice MCKENNA, in the prevailing opinion (p. 570) :

"the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions, the first in time may constitute the obligation of the contract and the measure of rights under it. Hence, the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff had acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted."

Neither in the prevailing opinion nor in the dissenting opinions of Mr. Justices HOLMES, is any reference made to the statute of 1892 as legislation subsequent to the alleged contract rights of the plaintiff, but it appeared in evidence, that the structure whose erection in the highway was held to constitute an impairment of plaintiff's easement of light and air, was built pursuant to the Act of 1892, passed after plaintiff purchased his property. That act, however, did not assume, any more than did the previous acts under which the railroad

was originally constructed, to authorize the occupation of the highway by the railroad company without compensation. It simply made no reference to compensation. The doctrine of the appurtenant easements of light and air was the creation of the Courts of New York in the elevated railroad cases, and the decisions of those Courts in the *Muhlker* case was, in effect, that where the structure already existed in the street, the mere alteration in its size, height, or width in conformity with legislative requirement, did not give the abutting owner a right to recover additional damages. What *this* Court held was, that when the plaintiff acquired his title, the elevated railroad cases were the law of New York and assured him that his easements of light and air were secured by contract, as expressed in those cases, and could not be taken from him without payment of compensation. Further, that the obligation of that contract was impaired by the decision of the State Courts to the effect that the structure could be altered and reconstructed in front of plaintiff's premises pursuant to the Act of 1902, without making compensation to him.

In the case at bar, when the plaintiff-in-error and his respective assignors entered into the contract with the City of New York, the State of New York, by its Legislature, had declared that the person, firm or corporation engaged in operating the railroad under those contracts should be exempt from taxation in respect of his, their or its interest under those contracts, and in respect of the equipment furnished thereunder. The plaintiff-in-error contracted in reliance upon that legislative act. By giving a construction to the tax laws subsequently passed, the Court of Appeals has

held that as a matter of fact the plaintiff-in-error is liable to be taxed in respect to this very interest, so declared to be exempt, under the guise of a tax upon its right to carry on business in its corporate capacity, measured by the benefits derived by it from the operation of the rapid transit railways. It is conceded by the Court that the plaintiff has *some* exemption. The extent of that exemption is, therefore, a matter for the independent determination of this Court.

The construction given by the Court of Appeals to the Act of 1909 distinctly impairs the contract as we contend it exists. It is no answer to say that the same Court might have reached the same decision upon the statutes as they existed prior to 1906, or as they existed between 1906 and 1909. *No attempt to subject it to such taxation was made under those earlier statutes.* The case comes here on appeal from a judgment which is based upon the statute of 1909, and even though that statute is a codification, with some modifications, of the earlier acts, none the less is the impairment of the contract by the later statute, as construed by the Court, an impairment by subsequent law within the meaning of the constitutional provision.

Yazoo Railroad Co. v. Thomas, supra.

Ross v. Oregon, 227 U. S., 150, is not an authority to the contrary. There was no question in that case about any subsequent legislation. The constitutional right claimed by the plaintiff-in-error to have been invaded was the protection against *ex post facto* laws. The case was a criminal prosecution by the State of Oregon against the defendants, charging them with having converted to their own

use a sum of money. It was contended that the decision of the Court which affirmed that conviction was at variance with the law as it had been previously construed by the Courts. It was, therefore, pointed out by this Court that it was asked by plaintiff-in-error to review, not a legislative act of the State, but an alleged erroneous interpretation put upon the statute of the State which was in force when the criminal act was committed, and which remained unchanged. This, the Court held it was without jurisdiction to do.

To the same effect is

Railroad Co. v. Cleveland, No. 95, Oct. T.,
1914.

VII.

The assessments, in so far as they are based upon dividends on the capital stock of plaintiff-in-error, all of which is invested in the equipment and operation of the rapid transit railways, and upon the gross earnings derived from such operation, are in direct violation of the exemption from taxation under which plaintiff-in-error entered into contracts for the equipment and operation of such railways, and constitute a taking of its property without due process of law contrary to the Fourteenth Amendment,

The Fourteenth Amendment affords practical and effective protection against arbitrary or illegal taxation.

Thus, "it is firmly established that consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits."

HARLAN, J., in *W. U. Tel. Co. v. Kansas*, 216 U. S., 1, 38.

The taking of private property without compensation is a denial of due process within the Fourteenth Amendment.

Chicago, etc., R. R. Co. v. Chicago, 166 U. S., 226.

The principle established in

Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania, 198 U. S., 341,

is applicable here.

The syllabus of that case is as follows:

"A tax on the value of the capital stock of a corporation is a tax on the property in which that capital is invested, and therefore no tax can be levied upon the corporation issuing the stock which includes property that is otherwise exempt.

The same rule that requires the exclusion from the assessment of valuation of capital stock of tangible personal property permanently situated out of the State applies to property sent out of the State to be sold, and which is actually out of the State when the assessment is made.

As a state cannot directly tax tangible property permanently outside the State, and having no *situs* within the State, it cannot attain the same end by taxing the enhanced

value of the capital stock of a corporation which arises from the value of the property beyond its jurisdiction. * * *

The collection of a tax on a corporation on its capital stock based on a valuation which includes property situated out of the State would amount to the taking of property without due process of law and can be restrained by the Federal Courts."

In other words, the Court holding a tax imposed upon "the actual value of its whole capital stock * * * as ascertained in the manner prescribed" * * * was in effect a tax on the property and assets of the corporation issuing such stock, entered upon an inquiry to determine whether the assessment complained of was in fact based upon property without the jurisdiction of the taxing power, and finding that it was so in part, *held* that "an appraisement thus made which includes such property is to that extent without jurisdiction and illegal" (p. 358).

Union Transit Co. v. Kentucky, 199 U. S.,
194,

is to the same effect.

And in *New York Central Railroad v. Miller*, 202 U. S., 584, the Court reviewed the action of the State authorities in imposing a tax under Section 182 of the Tax Law of 1896 (Chap. 908), upon the New York Central & Hudson River Railroad Company, upon the objection of the company that the tax was imposed upon all of its cars, a considerable proportion of which were constantly out of the State, and on this ground it contended that that proportion should be deducted from its entire capi-

tal in order to find the capital stock employed within the State; that the imposition of the tax upon those employed outside of the State was in effect the taking of property without due process. The evidence failing to show that any of the cars were used exclusively out of the State, it was held that the taxation of the cars under this act was not unconstitutional as depriving the owner of his property without due process of law. The Court treated the act as, in effect, imposing a tax upon property (see Opinion, HOLMES, *J.*, p. 586, cited *supra*). It seems to have been assumed that if the facts had shown that a portion of the company's cars were employed outside of the State at all times during the year they would have been without the jurisdiction of the State taxing authorities and the imposition of the tax upon them under this act would have constituted a taking of property without due process of law.

In the case at bar, the interests of the plaintiff-in-error under the contracts for the maintenance and operation of the rapid transit railways, and in respect to the equipment thereof, are expressly withdrawn from the jurisdiction of the taxing authorities by the statutes and contracts heretofore referred to. The imposition of a tax upon them by the State authorities, therefore, constitutes a taking of property without due process of law, to the same extent as though the property were situated without the jurisdiction of the State.

VIII.

On the whole case, therefore, it is submitted that the State Court erred in holding plaintiff-in-error subject to taxation under Sections 182 and 184 of the Tax Law, upon its capital stock, based upon the dividends earned and declared thereon, and upon its gross earnings from the operation of the rapid transit railways; and that the judgment of the State Court should be modified accordingly.

GEORGE W. WICKERSHAM,
JAMES L. QUACKENBUSH,
RALPH NORTON,
of counsel with plaintiff-in-error.

Office Supreme Court, U. S.

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Supreme Court of the United States

OCTOBER TERM—1914.

No. 129.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.*
INTERBOROUGH RAPID TRANSIT COMPANY,
Plaintiff-in-Error,

vs.

WILLIAM SOHMER, AS COMPTROLLER OF THE
STATE OF NEW YORK.

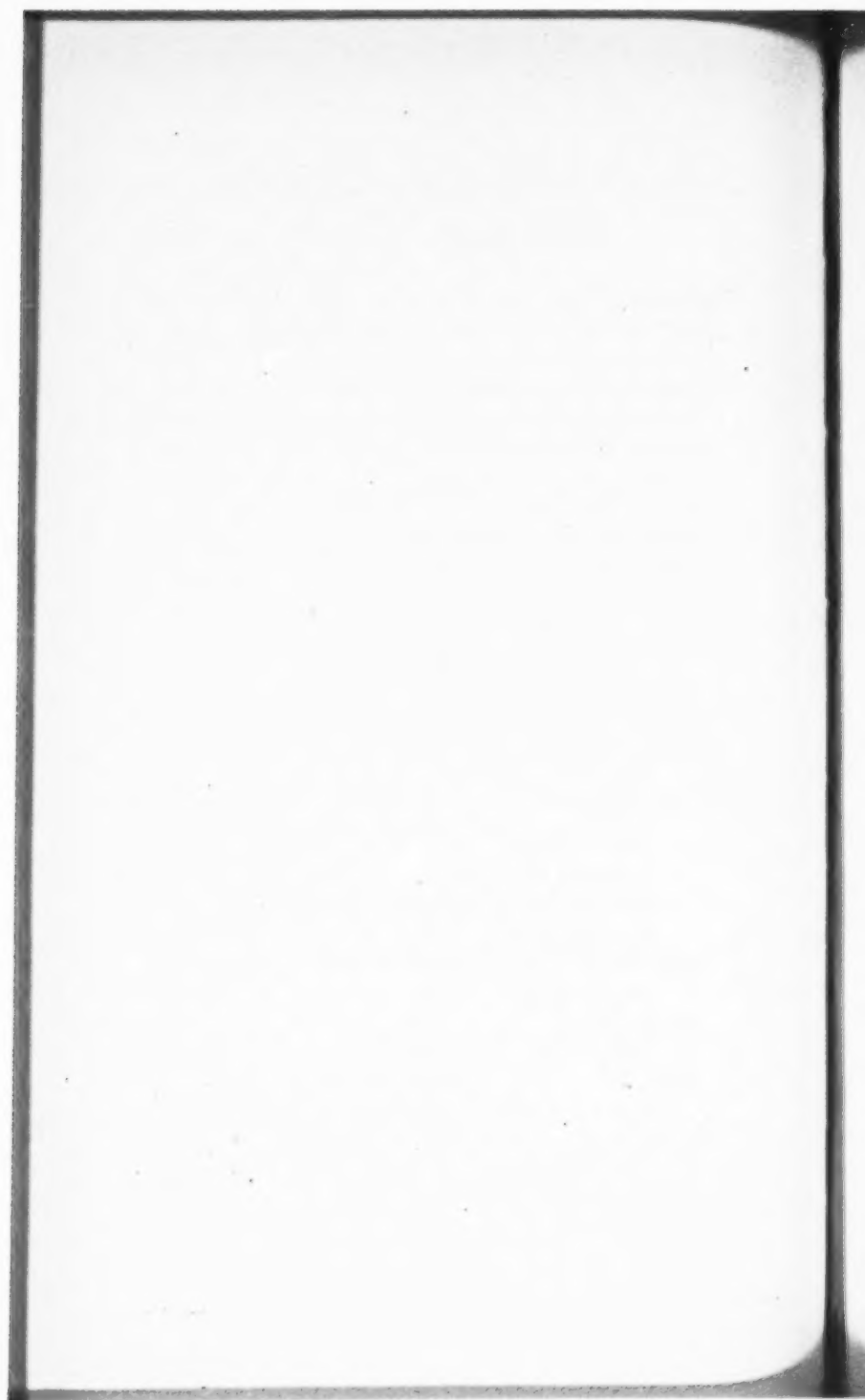
APPENDIX

TO

BRIEF FOR PLAINTIFF-IN-ERROR.

GEORGE W. WICKERSHAM,
JAMES L. QUACKENBUSH,
RALPH NORTON,

of Counsel.



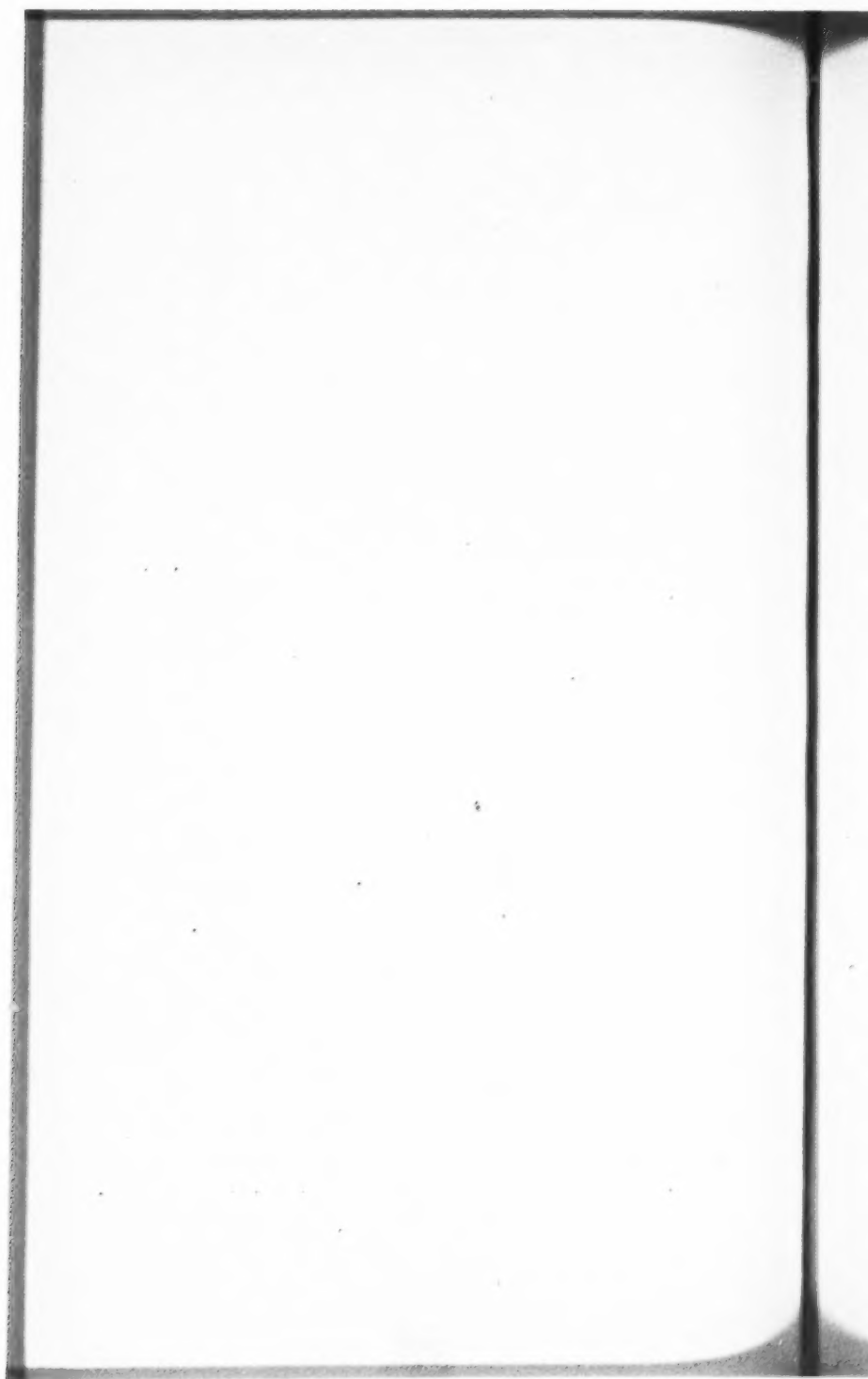
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THE RAPID TRANSIT ACT

and

AMENDMENTS UP TO 1902, WHEN CONTRACT
NO. 2 WAS EXECUTED.

LAWS OF 1891.

Chapter 4.

AN ACT to provide for rapid transit railways in
cities of more than one million inhabitants.

Approved by the Governor January 31, 1891.
Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In cities having over one million of inhabitants, according to the last preceding national or state census, where rapid transit commissioners shall have been appointed since the first day of December, eighteen hundred and ninety, under the provisions of chapter six hundred and six of the laws of eighteen hundred and seventy-five, and the amendments thereto, by the mayor of any such city, said commissioners shall become commissioners of rapid transit under the provisions of this act. If no such commissioners have been appointed since the first day of December,

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eighteen hundred and ninety, and the date of the passage of this act in any city in this state containing a population of over one million inhabitants, according to the last preceding national or state census, then the mayor of such city may at any time after the passage of this act, appoint five persons who shall be residents of such city, who shall be commissioners of rapid transit under the provisions of this act. The commissioners thus appointed are hereby constituted a board of rapid transit railroad commissioners, in and for the city in which they are appointed. They shall have and exercise the specific authority and powers hereinafter conferred, and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon the said board by this act. If a vacancy shall at any time occur in any such board of rapid transit railroad commissioners, such vacancy shall be filled by the mayor of the city in which said board exists, by the appointment of a citizen of said city, who shall belong to the same political party as did the commissioner whom such appointee succeeds.

§ 2. Within twenty days after the passage of this act, in the case of commissioners who become such by its terms, and within twenty days after their appointment in the case of commissioners appointed under its provisions, each of the said commissioners shall take and subscribe an oath faithfully to perform the duties of his office, which oath shall be filed in the office of the clerk of the county within which said board is appointed.

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§ 3. Within thirty days after the passage of this act, in the case of commissioners who become such by its terms, and within twenty days after their appointment, in the case of commissioners appointed under its provisions, the said commissioners shall meet and organize as a board. The board when so organized, may frame and adopt by-laws not inconsistent with this act, and establish suitable rules and regulations for the proper exercise of the powers and duties hereby conferred and imposed, and may from time to time amend the same. Four members of the board shall constitute a quorum for the transaction of business, but a less number may adjourn meetings. The said board shall adopt a seal and keep a record of its proceedings, which shall be a public record and be open to inspection at all reasonable times.

§ 4. The said board upon its own motion may proceed, from time to time, to consider and determine whether it is for the interest of the public and of the city in which it is appointed, that a rapid transit railway or railways for the conveyance and transportation of persons and property should be established therein, and upon the request in writing of local authorities of any such city at any time, the said board shall proceed forthwith to consider and determine the same questions, and in each case the said board shall conduct such an inquest and investigation as may be deemed necessary in the premises. If, after such consideration and inquest, the said board shall determine that a rapid transit railway or railways, in addition to any already existing, are necessary for the interest of the public and such city, it shall proceed to de-

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termine and establish the route or routes thereof and the general plan of construction. Such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected, and the concurrent votes of at least four members of the board shall be necessary for the purpose of determining and establishing such route or routes and plan of construction. The said board, from time to time, may locate the route or routes of such railway or railways over, under, upon, through and across any streets, avenues and lands within such city, including blocks between streets or avenues or partly over, under, upon, through and across any streets, avenues and lands within such city and partly through blocks between streets or avenues; provided that the consent of the owners of one-half in value of the property bounded on and the consent also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railway or railways be first obtained, or in case the consent of such property owners cannot be obtained, that the determination of three commissioners appointed by the general term of the supreme court in the district of the proposed construction, given after due hearing of all parties interested, and confirmed by the court, that such railway or railways ought to be constructed or operated, be taken in lieu of the consent of such property owners; except that no public park nor any lands or places, lawfully set apart for, or occu-

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pied by, any public building of any city or county, or of the state of New York, or of the United States, nor those portions of Grand, Classon, Franklin avenues and Downing street in the city of Brooklyn, lying between the southerly line of Lexington avenue and the northerly line of Atlantic avenue, nor that portion of Classon avenue in said city lying between the northerly line of Lexington avenue and southerly line of Park avenue, nor that portion of Washington avenue in said city lying between Park and Atlantic avenues, nor DeBevoise place, Irving place and Leffert's place, Lee avenue, Nostrand avenue, Waverly avenue, Vanderbilt avenue and Clinton avenue in said city of Brooklyn, nor that portion of the city of Buffalo lying between Michigan and Main streets, nor any part of Fifth avenue in the city of New York, nor that portion of any street or avenue which is now actually occupied by any elevated railroad structure, shall be occupied by any corporation to be organized under the provisions of this act for the purpose of constructing a railway in or upon any of such public parks, lands or places, or upon or along either of the said excepted streets or avenues. It shall be lawful for said commissioners to locate the route of a railway or railways, by tunnel under any such public parks, lands or places and to locate the route of any railways to be built under this act, across any of the streets and avenues now occupied by an elevated railroad structure in the city of New York or across any of the streets or avenues excepted in this act at any point at which, in its discretion, the board of rapid transit railroad commissioners may deem necessary in the location of any route or routes. Nothing in

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this act shall authorize the construction of an elevated railway on Broadway, south of Thirty-third street, nor on Madison avenue in the city of New York. It shall not be lawful to grant, use or occupy, for the purposes of an elevated railroad, except for the purpose of crossing the same, any portion of the following named streets and places in the city of New York, that is to say: Second avenue below Twenty-third street; Nassau street; Printing House square, so called, south of Frankfort street; Park Row, south of Tryon row; Broad street and Wall street.

§ 5. After any determination by said board of any such route or routes and of any general plan of construction of said railway or railways, the said board shall transmit to the common council of said city a copy of said plans and conclusions as adopted. It shall be the duty of such common council upon receiving such copy of plans and conclusions to appoint a day not less than one week nor more than ten days after the receipt thereof for the consideration of such plans and conclusions, and the said common council shall, on the day so fixed, proceed with the consideration thereof and may continue and adjourn such consideration, from time to time, until a final vote shall be taken thereon, as hereinafter provided. Within four weeks after the copy of such plans and conclusions adopted by the board of rapid transit railroad commissioners shall have first been received by said common council, a final vote shall be taken thereon, by ayes and nays, in the form of a vote upon a resolution to approve such plans and conclusions, and to consent to the construction of

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a railway or railways in accordance therewith. Upon the adoption of such resolution* a majority vote of all the members of the common council and the approval of the mayor, and in the case of the refusal or failure of the mayor to approve such resolution, then by a two-thirds vote of all of the members of the common council, the said plans and conclusions shall be deemed to have been finally consented to and adopted, and such consent shall be deemed to be the consent of the local authorities of such city; provided, that where in any such city the exclusive control of any street, road, highway or avenue which is to be used or occupied by any railway or railways, constructed under the provisions of this act, is by law vested in any local authority other than the common council of such city, the approval of the aforesaid plans and conclusions and the consent to the construction of a railway thereunder shall be given by such local authority in place of and if required in addition to such approval and consent by said common council and with like effect. Upon obtaining the approval and consent of the local authorities, as above provided, the said board of rapid transit railroad commissioners shall take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. For the purposes of this act the value of the property bounded on that portion of any street or highway in, upon, over or under which it is proposed to construct or operate such railway or railways, or any part thereof, shall

*So in the original.

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be ascertained and determined from the assessment-roll of the city in which the said property is situated, confirmed or completed last before the local authorities shall have given their consent as above provided. If such consents of property owners cannot be obtained, the said board may, in its own name, make application to the general term of the supreme court in the judicial district in which such railway is to be constructed for the appointment of three commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. Two weeks' notice of such application shall be given by daily publication thereof in six daily newspapers published in the city where such proposed railway is to be constructed, if there be so many newspapers published in said city, and if not, then in all the daily newspapers published in said city. The newspapers in which said publication shall be made, shall be designated by the general term of the supreme court to which such application is to be made on the application of the commissioners without notice. The said general term, upon due proof of the publication aforesaid, shall appoint three disinterested persons who shall act as commissioners, and such commissioners within ten days after their appointment shall cause public notice to be given in the manner directed by the said general term, of their first sitting and may adjourn from time to time until all their business is completed. Vacancies in such commission may be filled by said general term after such notice to persons interested as the general term may deem proper, and the evidence taken before as well as after such vacancy occurred shall be deemed to be

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properly before such commissioners. The said commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated and shall report the evidence taken to said general term, together with a report of their determination whether such road ought to be constructed and operated, which report if in favor of the construction and operation of such road shall, when confirmed by said court, be taken in lieu of the consent of the property owners above mentioned. Such report shall be made within sixty days after the appointment of said commissioners, unless the said court or a judge thereof shall extend such time.

§ 6. When the consents of the local authorities and the property owners, or in lieu thereof, the authorization of the said supreme court upon the report of commissioners, shall have been obtained, the board of rapid transit railroad commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railway or railways, including all devices and appurtenances deemed by it necessary to secure the greatest efficiency, public convenience and safety, including plans and specifications for suitable support, turnouts, switches, sidings, connections, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices and other suitable appliances incidental and requisite to what the said board may approve as the best and most efficient system of rapid transit in view of the public needs and requirements, and the said board may in its discretion include in said plans provisions for subways or tunnels for sewer, gas

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or water pipes, electric wires and other conductors proper to be placed under ground, whenever necessary so to do in order to permit of the proper construction of any railway herein provided for in accordance with the plans and specifications of the said board. Whenever the construction of any railway, depressed way, subway or tunnel under the provisions of this act shall interfere with, disturb or endanger any sewer, water pipe, gas pipe or other duly authorized subsurface structure, the work of construction at such points shall be conducted in the city of New York, in accordance with the reasonable requirements and under the supervision of the commissioner of public works, and in other cities in accordance with the reasonable requirements and under the supervision of the officer or local authority having the care of and the jurisdiction or control over such subsurface structures so interfered with, disturbed or endangered. All expenses incidental to such supervision and to the work of reconstructing, readjusting and supporting any such sewer, water pipe, gas pipe or other duly authorized subsurface structure shall be borne and paid by the company constructing any such railway, depressed way, subway or tunnel.

§ 7. The said board after having secured the necessary consents and after having prepared such detailed plans and specifications as are by this act provided for, shall sell at public auction in the city where said railway or railways are to be built and for the account and benefit of the said city the right, privilege and franchise to construct, maintain and operate such railway or railways.

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Notice of the time and place of such sale shall be published three times a week for at least six successive weeks in at least three daily newspapers published in said city. The board may prescribe all such terms and conditions of sale as it may deem to be for the interest of the public and of the city in which the railway or railways are to be constructed. The advertisement of sale shall contain only so much of the said terms, plans and specifications for the construction as the board may think proper, but such advertisement must state at what place the full terms, plans and specifications may be examined, and they shall be subject to examination under such reasonable rules and regulations as the board may prescribe. The terms of sale shall provide for the construction of the railway or railways under the supervision of the board, and for the approval of an engineer or engineers to be appointed from time to time by the board, and the corporation or corporations to be organized for the purpose of constructing and operating such railway or railways as in this act provided shall pay such engineer or engineers such salary as may, from time to time, be fixed by the said board of rapid transit railroad commissioners. Such engineer or engineers shall hold their office at the pleasure of the said board. The terms of sale shall require the successful bidder to deposit with the comptroller or chief fiscal officer of the city, in cash or approved securities, such amount as the board may deem sufficient to constitute a guarantee of full compliances with the terms of sale by the purchaser and by the corporation to be formed for the purpose of building and operating said railway as hereinafter provided. Said

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bids and all rights which may have been acquired thereunder shall become null and void and of no effect, at the option of said board, should there be a failure to organize a corporation to exercise such rights, privileges and franchises as required by said terms of sale and this act, or for any violation of any of the requirements of said terms of sale which should be complied with before such corporation is organized, and thereupon any deposit which may have been made pursuant to such terms of sale shall be paid into the treasury of such city upon a certificate being made and filed by said board with the public officer with whom such deposit shall have been made, that said bid and all rights which may have been acquired thereunder have become null and void and of no effect; and said rights, privileges and franchises shall be again sold by said board, subject to all the provisions of this act regulating such sales. The terms of sale shall require the construction of the road to be begun within a time to be specified in said terms of sale, and to be finished within a certain time thereafter to be specified therein and may prescribe the time within which portions of the same shall be begun and finished. The said terms of sale may reserve to the board the power to extend the times for the commencement and completion of the construction of said railway or of portions of the same if in its discretion the said board deem such extension to be for the best interests of the city. In case the corporation formed for the purpose of constructing said railway shall fail to begin or finish the construction within the the* times for those purposes

* So in the original.

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respectively limited, all rights, privileges and franchises of such corporation to maintain and operate said railway shall be forfeited, and upon such forfeiture being adjudged by the court in a suit brought for that purpose in the name of the people, or by said board of rapid transit railroad commissioners, then the said board shall have power to advertise and resell said rights, privileges and franchises and so much of the road as shall have been constructed by such corporation; such suit shall have preference over all other cases in all courts; and the proceeds of such resale shall be applied first to the payment of the expenses of the resale, and then to the discharge of any liens which may have been created upon such property, and the balance shall be paid over to the said corporation. The terms of sale must provide for the organization by the purchaser or purchasers of such rights, privileges and franchises of a corporation to exercise the same, and to construct, maintain and operate such rapid transit railway or railways, with the powers and subject to the duties and liabilities granted or imposed by this act. The said terms of sale must also specify the amount of the capital of any such corporation and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, and the maximum rates of fares and freight which such corporation may charge and collect for the carriage of persons and property. The said board may, if it considers that

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the public interest requires it to do so, reject all all* bids and readvertise the said rights, privileges and franchises for sale, with the same or different terms of sale, as often as it may deem necessary in the interest of such city, and shall finally accept that bid, which under all circumstances in its opinion is most advantageous to the public and such city; and no bid shall be accepted without the concurrent vote of four members of the board. The terms of sale on any such resale must contain all the provisions required by this act to be inserted in the original terms of sale. Such sale may be adjourned from time to time at the discretion of the board. All sales of such rights, privileges and franchises shall be made for a definite term of years, but the expiration of the term, if sold for a term of years, shall not impair any mortgage or other lien upon the property of such corporation or the rights of any creditor or creditors of such corporation; provided, however, that nothing herein contained shall be so construed as to extend the term for which such rights, privileges and franchises are sold.

§ 8. Within one year, and not less than six months, prior to the expiration of any term for which such rights, privileges and franchises shall have been sold, said board shall proceed to resell the right to maintain and operate the said railway. Such sale shall be made in the manner prescribed for the original sale, and the board is empowered to make suitable provisions for securing to the corporation then operating such railway or railways

*So in the original.

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suitable compensation for the railroad structure and appurtenances, and for any other property, real or personal, which the said corporation may own or of which it may be vested at the expiration of the term for which such rights, privileges and franchises were sold. Any corporation theretofore organized under the provisions of this act may be a purchaser on such resale; but if no such corporation be the purchaser, a new corporation shall be formed to maintain and operate said road in the manner prescribed for the organization of a corporation on the original sale, except that the plans and specifications according to which said railway has been constructed need not be set out at large, but may be referred to as forming part of the articles of association of said new corporation.

§ 9. (Authorized board to rent offices and employ subordinates.)

§ 10. (Provided ways and means for defraying expenses of board.)

§ 11. A corporation or corporations to construct and operate such rapid transit railway or railways and to enjoy and exercise the rights, privileges and franchises in this act provided for shall be created and organized in the manner following: Articles of association shall be duly signed and acknowledged by not less than twenty-five persons, and such articles shall set forth the name of the proposed corporation and duration thereof. Said articles must also state that they are made and filed under and in pursuance of this act for the

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purpose of taking and exercising the rights, privileges and franchises so purchased as aforesaid, according to the terms of sale; and such terms of sale and all plans and specifications must be made a part of said articles, annexed thereto and filed therewith. The said articles must also contain such other provisions as the said board may deem requisite and necessary, not inconsistent with the terms of sale or with this act. The said articles must be approved by said board, by the concurrent vote of four members and its approval must be indorsed thereon and attested by the seal of the board and the signature of its presiding officer, and must then be filed in the office of the secretary of state, and a duly certified copy or a duplicate thereof, must be filed in the office of the clerk of the county in which such railway or railways are to be constructed. Immediately after the articles of association shall have been so made, approved and filed, the board of rapid transit railroad commissioners shall cause books of subscription to the capital stock of any such corporation to be opened, and shall give public notice of the opening of such books and of the time and place at which subscriptions will be received; and when the full amount of such capital stock shall have been subscribed by not less than fifty persons, and such percentage of the amount subscribed as may have been fixed by the board in the terms of sale shall have been paid in in cash, to such bank or trust company as the board may select, the said board shall call a meeting of the subscribers for the purpose of organizing the corporation, serving upon or mailing to each subscriber a notice of such meeting at least ten days before the time appointed

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for holding the same; and the person or persons whose bid shall have been accepted by the said board of rapid transit railroad commissioners shall, if they elect to become subscribers to the capital stock of such corporation, be entitled to a preference for themselves and their associates in subscribing for, and in the allotment of the shares of capital stock of such corporation.

§ 12. At such meeting of subscribers thirteen directors of the corporation shall be elected, each of whom shall be a holder in his own right of at least one hundred shares of the capital stock of the corporation, and the board of rapid transit railroad commissioners shall appoint the the* inspectors of the first election. Each share of stock shall entitle the holder to one vote for each director. The directors so selected shall hold office for one year and until others are elected in their places. At such meeting by-laws must be adopted not inconsistent with this act, which by-laws shall, among other things, provide for:

1. The term of office of the directors elected at any subsequent meeting of stockholders, which term shall not exceed one year.

2. The manner of filling any vacancy which may occur in any office or in the board of directors.

3. The time and place of the annual meeting of stockholders.

4. The manner of calling and holding special meetings of stockholders.

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5. The number of stockholders who shall attend either in person or by proxy, at any stockholders' meeting in order to constitute a quorum.

6. The officers of the corporation, the manner of their election by the directors, and their duties and powers, and among which officers there shall be included a president, a secretary and a treasurer.

7. The manner of electing or appointing inspectors of election.

8. The manner of amending the by-laws.

The by-laws may also provide for the forfeiture of shares for the non-payment of calls and for such other matters as may be deemed proper by the board of rapid transit railroad commissioners and they must be approved by a resolution of said board.

§ 13. Within ten days after the said subscribers' meeting a record of the proceedings thereof, containing a copy of the subscription list, a copy of the by-laws adopted, and the names of the directors chosen, shall be prepared and duly certified by the person presiding over, and person acting as secretary of said meeting. There shall be attached thereto a certificate of the board of rapid transit railroad commissioners, attested by its seal and the signature of its presiding officer, that said board has approved the by-laws adopted at the subscribers' meeting, and that said corporation has been organized in accordance with the provisions of this act. The said record and certificate shall be filed by said board in the office of the secretary of state, and a duly certified copy

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or duplicate thereof shall be filed in the office of the clerk of the county in which said railway or railways are to be built, and thereupon and upon the payment to the state treasurer of a tax of one-eighth of one per centum of the par value of the capital stock of said corporation, such corporation shall be deemed to be fully organized. A copy of said certificate, duly certified by the secretary of state, or by the county clerk in whose office it is filed, shall be presumptive evidence of the due organization of such corporation in all courts and proceedings. Upon the production of the certified copy of said certificate, and upon the order of such corporation, the bank or trust company in which the percentage of subscriptions to the capital stock shall have been deposited, shall pay over to any such corporation the amount of such deposit, and said corporation shall repay to the purchaser or purchasers at the sale provided for in section seven of this act, the expenses paid by him or them to the city pursuant to the provisions of the terms of sale, with interest to the date of such repayment.

§ 14. The said board of rapid transit railroad commissioners, if, in their judgment, the public interest requires, may, at any time after the full organization of any such corporation, by the concurrent vote of four members, authorize such corporation to alter or add to the detailed plans and specifications contained in its articles of association, provided the plans and specifications as so modified do not change the route or routes of said railway and be not inconsistent with the general plan of construction, adopted under the provisions of section four of this act, and provided also such

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modifications be first approved by a vote of two-thirds of the directors of said corporation present and voting at any special meeting duly called for the purpose, by written notice stating the nature of the business to be transacted at said meeting. When such authorization by the board of rapid transit railroad commissioners shall have been given, a certificate shall be prepared, and acknowledged by the president and a majority of the directors of said corporation, stating the nature of the modification, and that the same has been approved by the board of directors in the manner above set forth, to which certificate there shall be attached a copy of so much of the original plans and specifications as are to be affected by the modification, and also the plans and specifications as modified. There shall also be contained in such certificate a declaration of the approval of said board of rapid transit railroad commissioners, attested in the same manner as the certificate of full organization. The said certificate, plans and specifications shall then be filed in the office of the secretary of state, and a certified copy or duplicate thereof shall be filed in the office of the clerk in which the articles of association are filed. And thereupon said corporation shall be authorized to construct its railway or railways and appurtenances in accordance with such modified plans and specifications.

§ 15. Every corporation organized under this act shall have its principal office and be taxed on its property in the city where its railway or railways are situated.

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§ 16. The affairs of said corporation shall be managed by a board of thirteen directors, who shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. In the election of directors, each stockholder shall be entitled to one vote for each share of stock held by him. Vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. No person shall be a director unless he shall be a stockholder owning one hundred shares of stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen. At every election of directors the books and papers of such corporation shall be exhibited to the meeting, provided a majority of the stockholders present shall require it.

§ 17. The directors shall require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in money at such times and in such installments as they may deem proper, not inconsistent with the by-laws and the articles of association.

§ 18. Each stockholder of any corporation formed under this act shall be individually liable to the creditors of such corporation, to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such corporation, until the whole amount of the capital stock so held by him shall have been paid to the

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corporation; and all the stockholders of any such corporation shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services, for thirty days' service performed for such corporation, but shall not be liable to an action therefor before an execution or executions shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such execution or executions shall be the amount recoverable, with costs, against such stockholders; before such laborer or servant shall charge such stockholder for such thirty days' service, he shall give him notice in writing within twenty days after the performance of such service, that he intends so to hold him liable, and he shall commence such action therefor within thirty days after the return of such execution unsatisfied, as above mentioned; and every such stockholder against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation, in ratable proportion to the amount of the stock they shall respectively hold.

§ 19. The stock of every corporation formed under this act shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the company, but no share shall be transferable until all previous calls thereon shall have been fully paid in.

§ 20. Any corporation formed under this act may increase or reduce its capital stock from time to time upon obtaining the approval of the board

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of rapid transit railroad commissioners by a concurrent vote of four members thereof. Such increase or reduction must be approved by a vote in person, or by proxy, of two-thirds in amount of all the stockholders of the corporation, at a meeting of such stockholders called by the directors of the corporation for that purpose, by a notice in writing to each stockholder, to be served on him in the manner provided for service of the notice of the subscribers' meeting provided for in section eleven of this act. Such notice shall state the time and place of the meeting, and its object, and the amount to which it is proposed to increase or reduce the capital stock. A statement of the increase or reduction shall be signed by the president and a majority of the directors and shall be filed in the office of the secretary of state and of the clerk of the county in which the original articles of association are filed. There must be attached thereto a certificate of the approval of said board of rapid transit railroad commissioners attested in the same manner as the certificate of full organization.

§ 21. No person holding stock in any such corporation, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent, as the testator or intestate or the ward or person interested in such trust fund

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would have been if he had been living and competent to act, and held the same stock in his own name.

§ 22. (Provided manner for enforcing lien of laborer.)

§ 23. Every such corporation shall have the right to acquire and hold such real estate or easement or other interest therein, or rights appertaining thereto, as may be necessary to enable it to construct, maintain and operate the said railway, or railways, and such as may be necessary for stations, depots, engine-house, car-houses, machine-shops and other appurtenances specified in the articles of association; and in case any such corporation cannot agree with the owner or owners of such property it shall have the right to acquire title to the same in pursuance of the terms of and in the manner prescribed in title one of chapter twenty-three of the Code of Civil Procedure, known as the condemnation law.

§ 24. Every corporation formed under this act shall have power:

1. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railway or railways, but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

2. To purchase, hold and use all such real estate and other property as may be necessary for the con-

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struction and maintenance of its railway or railways and the stations and other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing or in any way affecting the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelve, eighteen hundred and thirty-six.

3. To cross, intersect, join and unite its railway or railways with any other railway before constructed at any point on its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. And every corporation whose railway is or shall hereafter be intersected by any new railway shall unite with the owners of such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations can not agree upon the amount of compensation to be made therefor the same shall be ascertained and determined by commissioners to be appointed by the court, in the manner provided in this act in respect to acquiring title to real estate. And if the two corporations can not agree upon the points and manner of such crossing and connections, the board of rapid transit railroad commissioners shall determine the same on the application of either corporation.

4. To take and convey persons and property on its railway or railways by the power or force of steam, or by any motor other than animal power, and to receive compensation therefor not incon-

Chapter 4, Laws of 1891.

sistent with the provisions of this act and the terms of sale under which the said corporation shall have acquired its rights, privileges and franchises.

5. To enter upon and underneath the several streets, avenues, public places and lands designated by the said board of rapid transit railroad commissioners, and enter into and upon the soil of the same; to construct, maintain, operate and use, in accordance with the plan adopted by said board a railway or railways upon the route or routes and to the points decided upon, and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the railways constructed upon the plan adopted by the said board and which may be necessary for operating the same; except that nothing in this act shall authorize the construction of a railway crossing the track of any steam railway now in actual operation at the grade thereof, or the erection of piers or supports for any elevated railway upon a railway track now actually in use in any street or avenue; and it shall be lawful to make such excavations and openings along the route through which such railway or railways shall be constructed as shall be necessary from time to time; in all cases the surface of said streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be and under the direction of the proper local authorities and in all cases the use of the streets, avenues, places and lands designated by the said board, and the right of way through the same, for

Chapter 4, Laws of 1891.

the purpose of a railway or railways, as herein authorized and provided, shall be considered, and is hereby declared, to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held; but no such corporation shall have the right to acquire the use or occupancy of public parks or squares in such county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railway, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction.

6. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, but the amount of such bonds outstanding at any one time shall not exceed the amount limited by the articles of association.

§§ 25-31. (Made various provisions as to details of operation—identification of employes, the carriage of mail, frequency of service, liability of operator, etc.)

§ 32. (Provided means and manner by which corporations then operating railroads in the city might secure franchises for extensions or additional tracks.)

§ 33. Wherever the route selected by the said board of rapid transit railroad commissioners for the construction of such railway shall intersect,

Chapter 4, Laws of 1891.

cross or coincide with any railway track or tracks occupying the surface of any street or avenues, any corporation organized under this act is hereby authorized for the purpose of constructing the said work, to remove the track or tracks of any such surface railway or railways, but the same shall be done in such manner as to interfere as little as possible with the practical operation or workings of such surface railway or railways, and upon the construction of such railway built under and in conformity with the provisions of this act, where such removals or changes have been made, the same shall be restored, as nearly as may be, to the condition in which they were previous to the construction of any such railway built under the provisions of this act, and any damage which such company or companies may sustain, shall be ascertained by a commission to be appointed the same as in the case where lands are taken for the purposes of a railway route or routes as hereinbefore provided in this act. All such removals and restorations shall be made at the proper cost and charge of such corporation as may have entered upon the occupancy of such street or streets. Nothing contained in this act shall authorize any corporation formed thereunder to use the tracks of any horse railway.

§ 34. This act shall not be construed to repeal or in any manner affect chapter six hundred and six of the laws of eighteen hundred and seventy-five, entitled "An act to further provide for the construction and operation of a steam railway or railways in the counties of this state," or the acts amendatory thereof or supplemental thereto, or ar-

Chapter 4, Laws of 1891.

ticle five of chapter five hundred and sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except so far as the said acts, or either of them, would if this act had not been passed, authorize the appointment hereafter of any commissioners applied for as provided in section one of said act of eighteen hundred and seventy-five, or in section one hundred and twenty of said act of eighteen hundred and ninety, in any city or cities containing a population of over one million inhabitants, according to the last preceding national or state census or authorize any commissioners already appointed pursuant to the provisions of such act or acts in any such city or cities, to fix, determine or locate any new route or routes, pursuant to the provisions of either of said acts. This act shall not be construed in any manner to affect the exercise or enjoyment at any time, and from time to time hereafter, of any right or rights heretofore acquired, exercised or enjoyed by any corporation heretofore duly incorporated and organized or deriving powers and rights under the laws of this state. This act shall not affect or impair the exercise or enjoyment of any right or rights now possessed or heretofore acquired or heretofore authorized to be acquired, exercised or enjoyed by any street surface railroad corporation, except as herein otherwise expressly provided, and this act shall not be construed to repeal or in any manner affect chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," or either of the several acts amendatory thereof or supplementary thereto. This act shall not be construed to repeal or in any

Chapter 102, Laws of 1892.

manner affect chapter five hundred and sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except hereinabove expressly provided, or except so far as the provisions of the same conflict with the provisions of this act.

§ 35. No railroad shall be constructed or operated upon the surface of any street, avenue or highway in the city of New York under the provisions or authority of this act.

§ 36. All acts and parts of acts local or general inconsistent with this act are hereby repealed.

§ 37. This act shall take effect immediately.

LAWS OF 1892.**Chapter 102.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities having over one million inhabitants," passed January thirty-first, eighteen hundred and ninety-one.

Approved by the Governor March 9, 1892.
Passed, three-fifths being present.

This added a new section, No. 38, to the act of 1891, which was designed to permit the grant of elevated railway franchises to bridge corporations. The amendment has no relevancy to the subway contracts.

LAWS OF 1892.**Chapter 556.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Approved by the Governor May 13, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§§ 1-3. (Make minor amendments to Sections 6, 9 and 15 of the act of 1891.)

§ 4. Section twenty-four of said act is hereby amended so as to read as follows:

§ 24. Every corporation formed under this act shall have power;

1. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railway or railways, but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

2. To purchase, lease, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railway or railways, and the stations or other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be

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held as repealing or in any way affecting the act, entitled "An act authorizing the construction of railroads upon Indian lands," passed May twelve, eighteen hundred and thirty-six.

3. To cross, intersect, join and unite its railway or railways with any other railway at any point on its route and upon the grounds of such other railway company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. And every corporation whose railway is or shall be hereafter intersected by any new railway, shall unite with the owners of such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, the same shall be ascertained and determined by commissioners to be appointed by the court, in the manner provided in this act in respect to acquiring title to real estate. And if the two corporations cannot agree upon the points and manner of such crossings and connections, the board of rapid transit railroad commissioners shall determine the same on the application of either corporation.

4. To take and convey persons and property on its railway or railways by the power or force of steam, or by any motor other than animal power, and to receive compensation therefor not inconsistent with the provisions of this act, and the terms of sale under which the said corporation shall have acquired its rights, privileges and franchises.

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5. To enter upon and underneath the several streets, avenues, public places and lands designated by the said board of rapid transit railroad commissioners, and enter into and upon the soil of the same; to construct, maintain, operate and use, in accordance with the plan adopted by said board, a railway or railways upon the route or routes and to the points decided upon, and to secure the necessary foundations and erect the columns, piers and other structures which may be required to secure safety and stability in the construction and maintenance of the railways constructed upon the plan adopted by the said board, and which may be necessary for operating the same, except that nothing in this act shall authorize the construction of a railway crossing the track of any steam railway in actual operation at the grade thereof, and it shall be lawful to make such excavations and openings along the route through which such railway or railways shall be constructed as shall be necessary from time to time; in all cases the surface of said streets around such foundations, piers and columns shall be restored to the condition in which they were before such excavations were made, as near as may be, and under the direction of the proper local authorities; and in all cases the use of the streets, avenues, places and lands designated by the said board, and the right of way through the same, for the purpose of a railway or railways, as herein authorized and provided, shall be considered, and is hereby declared, to be a public use, consistent with the uses for which the roads, streets, avenues and public places are publicly held; but no such corporation shall have the right to acquire the use or occupancy of

Chapter 528, Laws of 1894.

public parks or squares in such county, or the use or occupancy of any of the streets or avenues, except such as may have been designated for the route or routes of such railway, and except such temporary privileges as the proper authorities may grant to such corporations to facilitate such construction.

6. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for such purposes; but the amount of such bonds outstanding at any one time shall not exceed the amount limited by the articles of association.

§ 5. This act shall take effect immediately.

LAWS OF 1894.**Chapter 528.**

AN ACT to amend section four of chapter four of the laws of eighteen hundred and ninety-one, excepting certain parks and streets from route for an elevated railroad.

Became a law May 8, 1894, with the approval of the Governor. Passed, three-fifths being present.

This amendment changes Section 4 of the act of 1891 only by specifying three additional streets in New York as excepted from elevated railroad construction.

LAWS OF 1894.**Chapter 752.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Became a law May 22, 1894, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," is hereby amended so as to read as follows:

§ 1. In each city having over one million of inhabitants, according to the last preceding national or state census, there shall be a board of rapid transit railroad commissioners in and for such city, which shall consist of the mayor of such city, the comptroller or other chief financial officer of such city, the president of the chamber of commerce of the state of New York, by virtue of his office, and the following named persons, to wit: William Steinway, Seth Low, John Claflin, Alexander E. Orr and John H. Starin. The members of said board shall be styled commissioners of rapid transit. Vacancies which may take place in the offices so held by the persons specifically named herein as such commissioners shall be filled by a majority vote of the remaining members of said board. The board thus constituted shall have and exercise the

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specific authority and powers hereinafter conferred and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by this act.

§§ 2-4. (Amend, in minor respects, Sections 2, 3 and 6 of the act of 1891, as to commissioners' oaths, quorum of board, and preparation of detail plans.)

§ 5. Section seven of said act is hereby amended so as to read as follows:

§ 7. If, after having secured the necessary consents and after having prepared such detailed plans and specifications as are by this act provided for, it shall not have been determined by vote of the people as provided by sections twelve and thirteen of this act that such railway or railways shall be constructed for and at the expense of such city as hereafter provided, said board shall sell at public auction in the city where said railway or railways are to be built and for the account and benefit of said city the right, privilege and franchise to construct, maintain and operate such railways or railways. Notice of the time and place of such sale shall be published three times a week for at least six successive weeks in at least three daily newspapers published in said city. The board may prescribe all such terms and conditions of sale as it may deem to be for the interest of the public and of the city in which the railway or railways are to be constructed. The advertisement of sale shall contain only so much of the said terms, plans and specifications for the construction as the said board may think proper, but such

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advertisement must state at what place the full terms, plans and specifications may be examined, and they shall be subject to examination under such reasonable rules and regulations as the board may prescribe. The terms of sale shall provide for the construction of the railway or railways under the supervision of the board, and for the approval of an engineer or engineers to be appointed, from time to time, by the board, and the corporation or corporations to be organized for the purpose of constructing and operating such railway or railways as in this act provided shall pay such engineer or engineers such salary as may, from time to time, be fixed by the said board of rapid transit railroad commissioners. Such engineer or engineers shall hold their office at the pleasure of the said board. The terms of sale shall require the successful bidder to deposit with the comptroller or chief fiscal officer of the city, in cash or approved securities, such amount as the board may deem sufficient to constitute a guarantee of full compliance with the terms of sale by the purchaser and by the corporation to be formed for the purpose of building and operating said railway as hereinafter provided. Said bids and all rights which may have been acquired thereunder shall become null and void and of no effect, at the option of said board, should there be a failure to organize a corporation to exercise such rights, privileges and franchises as required by said terms of sale and this act, or for any violation of any of the requirements of said terms of sale which should be complied with before such corporation is organized, and thereupon any deposit which may have been made pursuant to such terms of sale shall

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be paid into the treasury of such city upon a certificate being made and filed by said board with the public officer with whom such deposit shall have been made, that said bid, and all rights which may have been acquired thereunder, have become null and void and of no effect; and said rights, privileges and franchises shall be again sold by said board, subject to all the provisions of this act regulating such sales. The terms of sale shall require the construction of the road to be begun within a time to be specified in said terms of sale, and to be finished within a certain time thereafter, to be specified therein, and may prescribe the time within which portions of the same shall be begun and finished. The said terms of sale may reserve to the board the power to extend the times for the commencement and completion of the construction of said railway, or of portions of the same, if, in its discretion, the said board deem such extension to be for the best interests of the city. In case the corporation formed for the purpose of constructing said railway shall fail to begin or finish the construction within the times for those purposes respectively limited, all rights, privileges and franchises of such corporations to maintain and operate said railway shall be forfeited, and upon such forfeiture being adjudged by the court in a suit brought for that purpose in the name of the mayor, aldermen and commonalty of the city of New York, or such other appropriate corporate title of said city or by said board of rapid transit railroad commissioners, then the said board shall have power to advertise and resell said rights, privileges and franchises and so much of the road as shall have been constructed by such cor-

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poration, such suit shall have preference over all other cases in all courts; and the proceeds of such resale shall be applied first to the payment of the expenses of the resale, and then to the discharge of any liens which may have been created upon such property, and the balance shall be paid over to the said corporation. The terms of sale must provide for the organization by the purchaser or purchasers of such rights, privileges and franchises of a corporation to exercise the same, and to construct, maintain and operate such rapid transit railway or railways, with the powers and subject to the duties and liabilities granted or imposed by this act. The said terms of sale must also specify the amount of the capital of any such corporation, and number of shares of capital stock which such corporation shall be authorized to issue, the percentage to be paid in cash by the subscribers on subscribing for such shares, the maximum amount of the bonded indebtedness which such corporation be authorized to incur, and which may be secured by mortgage upon its property and franchises, and the rates of fares and freights which such corporation may charge and collect for the carriage of persons and property. But the rate of fare for any passenger on said railway from any point on the same northward or southward within the city of New York shall not exceed five cents under any provision of this act. The said board may, if it considers that the public interest requires it to do so, reject all bids and readvertise the said rights, privileges and franchises for sale, with the same or different terms of sale, as often as it may deem necessary in the interest of such city, and shall finally accept that

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bid which, under all circumstances, in its opinion, is most advantageous to the public and such city; and no bid shall be accepted without the concurrent vote of six members of the board. The terms of sale on any such resale must contain all the provisions required by this act to be inserted in the original terms of sale. Such sale may be adjourned from time to time at the discretion of the board. All sales of such rights, privileges and franchises shall be made for a definite term of years, but the expiration of the term, if sold for a term of years, shall not impair any mortgage or other lien upon the property of such corporation or the rights of any creditor or creditors of such corporation; provided, however, that nothing herein contained shall be so construed as to extend the term for which such rights, privileges and franchises are sold.

§§ 6-7. (Amend, in minor respects, Sections 9 and 10 of the act of 1891, as to rental of offices, employment of subordinates, and payment of expenses. Due to a clerical error of the engrosser, there is no § 8 of the amending act.)

§ 9. Said act is further amended by changing the numbers of sections thirty-four, thirty-five, thirty-six and thirty-seven of said act so that said sections shall be respectively designated as sections sixty-four, sixty-five, sixty-six and sixty-seven, and also by inserting immediately after section thirty-three, so that the same shall form a part of said act, the following sections, to wit:

§ 34. In case the people shall determine by vote, as hereinafter provided in sections twelve and

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thirteen of this act that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or to adopt other or different routes, plans and specifications for such railway or railways, provided, always that in all cases in which any such change or modification shall be of such a character as to require the consents thereto referred to in section five of this act, and in all cases where other or different routes and plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. As soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfill and carry out said contract, for the construction of such road or roads, upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out

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of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads as the necessities of said city and the increase of its population may in the judgment of said board require. Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five, nor more than fifty years, and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board. Such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum, to be specified in said contract, which shall not be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and a sum, in addition to said interest, not less than one per centum per annum

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upon the whole amount of said bonds. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested and with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Said contract may provide for the construction of said road in sections, and in all cases shall specify when the construction of said road, or sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and opera-

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tion of said road, shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond. Said bond shall be a continuing security, and shall provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation, of all the conditions, covenants and requirements specified and provided for in said contract. The said contracting person, firm or corporation shall also, simultaneously with the execution and delivery of said contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars as further security for the faithful performance by such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenants, conditions and agreements of said contract on his, their or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure

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by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of all the members of said board, relieve from such lien, any of the property to which the same may attach, upon receiving additional security which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. Upon the completion of the construction and equipment of said road to the satisfaction of said board and when the operation of the same shall have commenced pursuant to said contract it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation said sum of one million dollars so to be deposited as above provided, and said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they, or it shall have contracted to pay to said city for the use of said road a sum which shall be equal to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road. The said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the

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conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repair of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation and his or its bondsmen, shall be and continue jointly and severally liable to the aforesaid city for the amount of such deficiency until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad commissioners concurred in by all the members of said board.

§ 35. The person, firm or corporation operating such road, shall be exempt from taxation in respect to his, their or its interest therein under

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said contract and in respect to the rolling stock and other equipment of said road, but this exemption shall not extend to any real property which may be owned and employed by said person, firm or corporation in connection with the construction or operation of said road.

§ 36. The said board of rapid transit railroad commissioners before awarding any contract or contracts shall advertise for proposals for such contracts by a notice to be printed twice a week for three successive weeks in not less than four of the daily newspapers published in said city, and in such newspapers published elsewhere than in said city as said board shall determine. Such notice shall set forth and state the points within said city, between which said road or roads is or are to run, the general method of construction, the route or routes to be followed, the term of years for which it is proposed to make such contract, and such other details and specifications as said board shall deem to be proper. Said notice shall state the time and place at which said proposals will be opened, and the said board shall attend at the time and place so specified, and shall publicly open all proposals that shall have been received, but the said board shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of such board, best promote the public interest, and award a contract accordingly. All contracts made under authority of this act must, before execution, be ap-

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proved as to form by the counsel to the corporation or other chief legal adviser to said city.

§ 37. For the purpose of providing the necessary means for such construction, at the public expense, of any such road or roads, the board of estimate and apportionment, or other local authority in said city, in which such road or roads are to be constructed, having power to make appropriations of moneys to be raised by taxation therein, from time to time, and as the same shall be necessary, and upon the requisition of said board of rapid transit railroad commissioners, shall direct the comptroller, or other chief financial officer of said city, and it shall thereupon become his duty to issue the bonds of said city at such a rate of interest, not exceeding three and one-half per centum per annum, as said board of estimate and apportionment, or other local authority directing the issue of such bonds, may prescribe. Said bonds shall provide for the payment of the principal and interest in gold coin of the United States of America. They shall not be sold for less than the par value thereof, and the proceeds of the same shall be paid out and expended for the purposes for which the same are issued, upon vouchers certified by said board of rapid transit railroad commissioners. Said bonds shall be free from all taxation for city and county purposes, and shall be payable at maturity out of the sinking fund for the payment of the city debt, if there be such a sinking fund of said city; but if there be no such sinking fund, then out of a sinking fund to be established and created out of the annual rentals of said road as hereinbefore provided. The amount of bonds

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authorized to be issued and sold by this section shall not exceed fifty millions of dollars, par value, without the consent of the legislature first had and obtained.

§ 38. The board of rapid transit railroad commissioners, for and on behalf of the said city in which such road or roads may be constructed, may, from time to time, with the concurrence of all the members of said board and the consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted to construct, equip, maintain and operate said road or roads, or any of them, agree with said contracting person, firm or corporation upon changes in and modifications of said contract, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section; but in no event shall the annual rental to be paid to said city, for the use of said road, be reduced below the minimum rate hereinbefore provided.

§ 39. For the purpose of constructing any such road the said board for and in behalf of said city may acquire, as in this act provided, any real estate, and any rights, terms, and interest therein, and any and all rights, privileges, franchises and easements, which, in the opinion of the board, it shall be necessary to acquire or extinguish for the purpose of constructing and operating such road.

Chapter 752, Laws of 1894.

§§ 40-59. (Contain various and minute provisions for the acquisition of lands or interests therein, necessary for the railroad, by condemnation proceedings, and the payment of awards therefor.)

§ 60. All property acquired under the provisions of this act shall be and shall be deemed to have been acquired for public uses and purposes, and for the purpose of affording increased facilities for rapid transit between points within the city acquiring such property.

§ 61. The moneys necessary and sufficient to be paid for any property, acquired in any manner under the provisions of this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to such property, and for surveying and locating the same, and for preparing the necessary maps and plans in connection therewith, shall be raised and paid out of the proceeds of bonds issued and sold as provided by section thirty-seven of this act, and all such expenses as well as those incurred as provided in the next section shall be deemed a part of and included in the cost of constructing the road or roads, the construction of which rendered it necessary to acquire the property in the course of the acquisition of which such expenses may be incurred.

§ 62. (Provides for fees of commissioners of appraisal in condemnation proceedings.)

§ 63. In case it shall be determined by vote of the people as provided by sections twelve and thirteen of this act, to construct by and at the city's ex-

Chapter 752, Laws of 1894.

pense, then and in that event the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls, and subject to such reasonable rules and regulations as may be imposed and provided for by the board of rapid transit railroad commissioners in said city.

§ 10. Whenever it is expressly provided in the act hereby amended that any act of the board of rapid transit railroad commissioners shall be done by the concurrent vote of four of the members of said board, the act hereby amended is further amended so as to provide in such cases that such vote shall be that of six of such members.

§ 11. (Provides for ascertainment and payment of expenses and compensation of board.)

§ 12. The said board of rapid transit railway commissioners shall cause the question, whether such railway or railways shall be constructed by the city and at the public expense, to be submitted to the vote of the qualified electors of the city within which such railway or railways is or are to be constructed, and to that end it shall be the duty of the said board, after completion of the detailed plans and specifications, as required by the act hereby amended, at least thirty days prior to the next general election, to file with the public officer or officers within the county in which such city is located, who may be charged with the duty of

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printing the ballots to be used at such election, a request that separate ballots be printed and supplied to such electors, one-half in number of which shall read: "For municipal construction of rapid transit road," and the other half in number of said ballots shall read, "Against municipal construction of rapid transit road." Upon such request being so filed, such ballots shall be printed and supplied to such electors at such general election, and separate ballot boxes shall be provided for the reception of the same in each election district within such city, and the provisions of chapter six hundred and eighty of the laws of eighteen hundred and ninety-two, entitled "An act in relation to the elections constituting chapter six of the general laws," and any act or acts amendatory thereof or supplemental thereto shall apply thereto as far as the nature of the case may allow. No ballot which may be provided under this section shall be deemed invalid by reason of any error in dimensions, style of printing, or other formal defect, or through having been deposited in the wrong ballot box, but all of such ballots shall be canvassed and returned as if such formal defect had not existed, or as if they had been deposited in the box provided for the purpose. Upon the canvass of such votes by the board of county canvassers of the county in which such city is located, it shall be the duty of said board to file with the county clerk of said county a statement which shall declare the total number of votes cast in said city "for municipal construction of rapid transit road," and the total number so cast therein "against municipal construction of rapid transit road." And the said railway or railways shall be constructed by the said city and at the public ex-

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pense, if it shall be found from such statements so filed that there is a majority of the votes so cast in favor of such municipal construction.

§ 13. In case the majority of votes cast at such election shall be in favor of such municipal construction of said railway or railways, it shall be the duty of said board of rapid transit railway commissioners within thirty days after the official declaration of the said vote to proceed to construct the said railway or railways, and to make and let all contracts required for the performance of the work necessary to be done and performed in and about the construction thereof. All such contracts must, before execution, be approved as to form by the counsel to the corporation, or other chief legal adviser for said city.

§ 14. This act shall take effect immediately; except that the building of said road, or the sale of the franchises as provided for in sections seven and thirty-four of the act hereby amended, as so amended, is postponed until, and made dependent upon, the determination of that question by the vote of the people as called for by sections twelve and thirteen of this act.

LAWS OF 1895.**Chapter 519.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Became a law May 2, 1895, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. (Amends Section 4 of the act of 1891 only by designating additional streets which are to be excepted from elevated railroad construction.)

§ 2. (Amends, in minor respects, Section 5 of the act of 1891 as to the adoption of detailed plans, and the consents of the local authorities.)

§ 3. (Amends Section 6 of the act of 1891 by permitting the Board to make provisions, in rapid transit plans, for sewers, gas and water pipes, and other subsurface conductors.)

§ 4. Section seven of said act is hereby amended by striking therefrom the words "sections twelve and thirteen of this act," and by inserting in lieu thereof the words "sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four."

§ 5. (Amends Section 9 of the act of 1891, relative to rental of offices and employment of subordinates, by adding permission to the Board to sue in its own name.)

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§ 6. (Amends Section 26 of the act of 1891 as to the carriage of mail.)

§ 7. (Amends Section 30 of the act of 1891 as to liability of persons, etc., for interfering with construction.)

§ 8. (Amends Section 32 of the act of 1891 as to acquisition of franchises for additional tracks or extensions by corporations owning and operating a railroad in the city.)

§ 9. Section thirty-three of said act is hereby amended so as to read as follows:

§ 33. Wherever or whenever the route selected by the said board of rapid transit railroad commissioners for the construction of such railway shall intersect, cross or coincide with any railway track or tracks occupying the surface of any street or avenues, or the construction or operation of said railway shall interfere with any pipes, sewers, subways, or underground conduits or ways, any corporation organized under this act, or any contractor or person constructing any railway or part of a railway under any contract made with the board of rapid transit railroad commissioners, is hereby authorized, for the purpose of constructing the said work, to remove the track or tracks of any such surface railway or railways, or any such pipes, sewers, subways, or underground conduits or ways, but the same shall be done in such manner as to interfere as little as possible with the practical operation or workings of such surface railway or railways, or the works or business of the owners of

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any such pipes, sewers, subways, or underground conduits or ways, and upon the construction of such railway built under and in conformity with the provisions of this act, where such removals or changes have been made, said track or tracks, pipes, sewers, subways or underground conduits or ways shall be restored, as nearly as may be, to the condition in which they were previous to the construction of any such railway built under the provisions of this act, and any damages which such company or companies or owners may sustain, shall be ascertained by a commission to be appointed the same as in the case where lands are taken for the purpose of a railway route or routes as hereinbefore provided in this act. For the purpose of the construction or operation of any railway under the provisions of this act, the board of rapid transit railroad commissioners may remove or cause to be removed, any pipes, sewers, subways or underground conduits or ways underneath any street, highway, park, or public place, provided, however, that the same shall be replaced as soon as practicable, either in the same position as before or in a secure and convenient position underneath such street, highway, or public place. All such removals and restorations shall be made at the proper cost and charge of such corporation, contractor, or person as may have made such removals, but subject to the provisions of its, his, or their contract, if any, with the board of rapid transit railroad commissioners. Nothing contained in this act shall authorize any corporation formed thereunder to use the tracks of any horse railway. For the purpose of facilitating construction, and to diminish the period of occupancy of any street for the transportation of material,

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any contractor acting under a contract made in pursuance of this act, or of any act supplementary hereto or amendatory hereof, may with the approval of the board of rapid transit railroad commissioners lay upon or over the surface of any street, temporary tramways to be used only for the removal of excavated materials or the transportation of material for use in the construction.—Provided, however, that any such tramway shall be forthwith removed upon the direction of the board of rapid transit railroad commissioners; and provided further, that this provision shall not be construed to authorize the construction or operation of any street railroad, or to grant to any corporation, association or individual the right to lay down railroad tracks.

§ 10. Section thirty-four of said act added thereto by chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, entitled “An act to amend chapter four of the laws of eighteen hundred and ninety-one, entitled ‘An act to provide for rapid transit railways in cities of over one million inhabitants,’ ” is hereby amended so as to read as follows:

§ 34. In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors,

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and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or to adopt other or different routes, plans and specifications for such railway or railways, provided, always that in all cases in which any such change or modification shall be of such a character as to require the consents thereto referred to in section five of this act, and in all cases where other or different routes or general plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. As soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfil and carry out said contract, for the construction of such road or roads, upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may

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by separate contracts, executed from time to time, provide for the construction of parts of said road or roads, or for the construction at first of two or more tracks over a part or parts of such road or roads, and afterwards of one or more additional tracks over a part or parts of such road or roads, as the necessities of said city and the increase of its population may in the judgment of said board require. The board may also in a contract for a part of such a road insert a provision that at a future time upon the requirement of the board the contractor shall construct the remainder or any part of the remainder of said road, as the growth of population or the interests of the city may in the judgment of the board require, and may in such contract insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the contractor for such additional construction, and to the end of such ascertainment may provide for arbitration or for determination by a court of the amount of such compensation, or of any other details of construction which shall not be prescribed in the contract, but which shall be deemed necessary or convenient by said board. Any such contract may provide, if the public interest shall, in the opinion of the board, justify the provision, that the construction of any section or portion of the road may, with the consent of the board, be suspended during the term of operation of the railroad as hereinafter mentioned, or any part of such term, provided, that during such term or part of term the contractor shall use in lieu of such portion of the road a railroad owned or leased by the contractor or a portion or section thereof, which shall, with the railroad or portion of railroad con-

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structed by it under its contract with the board, form a continuous and convenient route. Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five, nor more than fifty years, and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board, provided, that in case the contract shall provide for construction at different times or at intervals of time of different parts of a road, or if the contract shall provide for the use by the contractor of an existing railroad as part of a continuous route as aforesaid, then and in any such case the board of rapid transit railroad commissioners may in its discretion prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Such contract shall further provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages, or otherwise, on the part of any owner,

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abutting owner, or other person. Such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds,—provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of the said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. Such rental and the term for the operation of said road shall begin as to said road or any section thereof when the same shall be declared by the board of rapid transit railroad commissioners to be completed and ready for operation. For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds theretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges, or property other than lands acquired in fee. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said

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interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Said contract may provide for the construction of said road in sections, and except as herein otherwise provided, shall specify when the construction of said road, or sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of said road, shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond. Said bond shall be a continuing security, and shall provide for the

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prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation, of all the conditions, covenants and requirements specified and provided for in said contract. The said contracting person, firm or corporation shall also simultaneously with the execution and delivery of said contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars in cash or in securities of a value not less than one million dollars, which securities shall be of the character of those in which the savings banks of this State are authorized by law to invest moneys, and shall be approved by the board of rapid transit railroad commissioners, which cash or securities shall, under such terms and conditions as shall be provided in the said contract, be further security for the faithful performance by such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement

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said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of six of the members of said board, relieve from such lien, any of the property to which the same may attach, upon receiving additional security which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. Upon the completion of the construction and equipment of said road to the satisfaction of said board, and when the operation of the same shall have commenced pursuant to said contract, it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation said sum of one million dollars in cash or the said securities so to be deposited as above provided, and said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they or it shall have contracted to pay to said city for the use of said road a sum which shall be equal, as the case may be, either to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road or to the interest, dividends, or other income which said city shall have received from the said securities. The said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case

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of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repairs of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation and his or its bondsmen, shall be and continue jointly and severally liable to the aforesaid city for the amount of such deficiency until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad commissioners concurred in by all the members of said board. It shall be deemed to be part of every such contract that, in case the board of rapid transit railroad commissioners shall

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cease to exist, the legislature may provide what public officer or officers of the city shall exercise the powers and duties belonging to the board of rapid transit railroad commissioners under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct or to operate the railway according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the board of rapid transit railroad commissioners may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the board of rapid transit railroad commissioners seem just and with such person or corporation as to the said board may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default. Any railway corporation, organized under the laws of this State, or any existing railway corporation owning or actually operating a railway wholly or in part within the limits of the

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city, in and for which said board has power to act, shall be competent and is hereby authorized to enter into a contract for the construction and operation of any railway pursuant to the provisions of this chapter.

§ 11. Section thirty-six of said act added thereto by chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four is hereby amended so as to read as follows:

§ 36. The said board of rapid transit railroad commissioners before awarding any contract or contracts shall advertise for proposals for such contracts by a notice to be printed twice a week for three successive weeks in no less than four of the daily newspapers published in said city, and in such newspapers published elsewhere than in said city as said board shall determine. Such notice shall set forth and state the points within said city, between which said road or roads is or are to run, the general method of construction, the route or routes to be followed, the term of years for which it is proposed to make such contract, and such other details and specifications as said board shall deem to be proper. Said notice shall state the time and place at which said proposals will be opened, and the said board shall attend at the time and place so specified, and shall publicly open all proposals that shall have been received, but the said board shall not be bound to accept any proposals so received, but may reject all such proposals and readvertise for proposals in the manner hereinbefore provided, or may accept any of such proposals as will, in the judgment of such board, best promote

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the public interest, and award a contract accordingly.

§ 12. Section thirty-seven of said act as amended by said chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four is hereby amended so as to read as follows:

§ 37. For the purpose of providing the necessary means for such construction, at the public expense, of any such road or roads and the necessary means to pay for lands, property, rights, terms, privileges and easements, whether of owners, abutting owners, or others, which shall be acquired by the city for the purposes of the construction or the operation of such road or roads as hereinafter provided, and of meeting the interest on the bonds in this section hereinafter provided for accruing thereon prior to the completion and readiness for operation of the portion of such road or roads for the construction of which such bonds shall have been respectively issued, the board of estimate and apportionment, or other local authority in said city, in which such road or roads are to be constructed, having power to make appropriations of moneys to be raised by taxation therein, from time to time, and as the same shall be necessary, and upon the requisition of said board of rapid transit railroad commissioners, shall direct the comptroller, or other chief financial officer of said city, and it shall thereupon become his duty, to issue the bonds of said city at such a rate of interest, not exceeding three and one-half per centum per annum, as said board of estimate and apportionment, or other local authority directing the issue of such bonds, may

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prescribe. Said bonds shall provide for the payment of the principal and interest in gold coin of the United States of America. They shall not be sold for less than the par value thereof, and the proceeds of the same shall be paid out and expended for the purposes for which the same are issued, upon vouchers certified by said board of rapid transit railroad commissioners. Said bonds shall be free from all taxation for city and county purposes, and shall be payable at maturity out of the sinking fund for the payment of the city debt, if there be such a sinking fund of said city; but if there be no such sinking fund, then out of a sinking fund to be established and created out of the annual rentals of said road as hereinbefore provided. But this provision that the said bonds shall be payable out of such sinking fund shall not diminish or affect the obligation of said city as a debtor upon said bonds, or any other right or remedy of any holder or owner of any such bonds, to collect the principal or interest thereof. The amount of bonds authorized to be issued and sold by this section shall not exceed fifty millions of dollars, par value, without the consent of the legislature first had and obtained, provided, however, that such amount shall be increased by a sum not exceeding five millions of dollars, if the board of rapid transit railroad commissioners shall certify that such increase is made necessary by payments required for any lands, property, rights, terms, easements or privileges which shall be acquired by the said city as hereinafter provided.

§ 13. Section thirty-eight of said act added thereto by chapter seven hundred and fifty-two of the

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laws of eighteen hundred and ninety-four is hereby amended so as to read as follows :

§ 38. The board of rapid transit railroad commissioners, for and on behalf of the said city in which such road or roads may be constructed, may, from time to time, with the concurrence of six members of said board and the consent, in writing, of the bondsmen or sureties of the person, firm or corporation which has contracted to construct, equip, maintain and operate said road or roads, or any of them, agree with said contracting person, firm or corporation upon changes in and modifications of said contract, or of the plans and specifications upon which said road or roads is or are to be constructed, but no change or modifications in the plans and specifications consented to and authorized pursuant to section five of this act shall be made without the further consent and authorization provided for in said section ; but in no event shall the annual rental to be paid to said city, for the use of said road, be reduced below the minimum rate hereinbefore provided.

§ 14. Section thirty-eight of said act added thereto by chapter one hundred and two of the laws of eighteen hundred and ninety-two, entitled "An act to amend chapter four of the laws of eighteen hundred and ninety-one, entitled 'An act to provide for rapid transit railways in cities having over one million inhabitants,' passed January thirty-first, eighteen hundred and ninety-one," is hereby amended so that the number of said section so added shall be thirty-eight (a) instead of thirty-eight.

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§ 15. Section thirty-nine of said act added thereto by said chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four is hereby amended so as to read as follows:

§ 39. For the purpose of constructing or operating any road for the construction and operation of which a contract shall have been made by the board of rapid transit railroad commissioners, including necessary stations and station approaches, or for the purpose of operating or securing the operation of the same free of interference and right of interference and of action and right of action for damages or otherwise, whether by abutting owners or others, or to provide, lay or maintain conduits, pipes, ways or other means for the transmission of electricity, steam, water, air or other source or means of power or of signals or messages necessary or convenient for or in the construction or operation of such road, or for the transportation of materials necessary for such construction or operation, or to provide a temporary or permanent way or course for any such conduit, pipe or other means or source of transportation, the said board for and in behalf of said city may acquire, as in this act provided, any real estate, and any rights, terms and interest therein, and any and all rights, privileges, franchises and easements, whether of owners or abutting owners or others, including any rights of owners, abutting owners, or others to interfere with the construction or operation of such road or to recover damages therefor, which, in the opinion of the board, it shall be necessary to acquire or extinguish for the purpose of constructing and operating such road free of interference or right of in-

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terference. The word "property" hereinafter used shall be deemed to include any such real estate, and any rights, terms and interest therein, and any such rights, privileges, franchises and easements, whether of owners, abutting owners, or others.

§§ 16-29. (Amend, in minor respects, Sections 40, 41, 43, 44, 47-53, 57, 59 and 61 of the Rapid Transit Act, added by the amendment of 1894, relative to the acquisition, by condemnation proceedings, of property and rights necessary for construction of the railroad.)

§ 30. Section sixty-three of said act added thereto by chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four is hereby amended by striking therefrom the words "sections twelve and thirteen of this act," and by inserting in lieu thereof, the words "sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four."

§ 31. Section sixty-four of said act, amended as to its number by chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, is hereby amended so as to read as follows:

§ 64. This act shall not be construed to repeal or in any manner affect chapter six hundred and six of the laws of eighteen hundred and seventy-five, entitled "An act to further provide for the construction and operation of a steam railway or railways in the counties of this State," or the acts amendatory thereof or supplementary thereto, or article five of chapter five hundred and sixty-five

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of the laws of eighteen hundred and ninety, known as the railroad law, except so far as the said acts or either of them, would if this act had not been passed, authorize the appointment hereafter of any commissioners applied for as provided in section one of said act of eighteen hundred and seventy-five, or in section one hundred and twenty of said act of eighteen hundred and ninety, in any city or cities containing a population of over one million inhabitants, according to the last preceding national or State census or authorize any commissioners already appointed pursuant to the provisions of such act or acts in any such city or cities, to fix, determine or locate any new route or routes, pursuant to the provisions of either of said acts. This act shall not be construed in any manner to affect the exercise or enjoyment at any time, and from time to time hereafter, of any right or rights heretofore acquired, exercised or enjoyed by any corporation heretofore duly incorporated and organized or deriving powers and rights under the laws of this State. This act shall not affect or impair the exercise or enjoyment of any right or rights now possessed or heretofore acquired or heretofore authorized to be acquired, exercised or enjoyed by any street surface railroad corporation, except as herein otherwise expressly provided, and this act shall not be construed to repeal or in any manner affect chapter one hundred and forty of the laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," or either of the several acts amendatory thereof or supplementary thereto. This act shall not be construed to repeal or in any manner affect chapter five hundred and

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sixty-five of the laws of eighteen hundred and ninety, known as the railroad law, except as hereinabove expressly provided, or except so far as the provisions of the same conflict with the provisions of this act. But nothing in this section contained shall prevent the board of rapid transit railroad commissioners from laying out a route for a railway and constructing a railway, and such board shall have the right to lay out such route and construct such railway, over, under, along or across any street in, along, under or over which there shall be any existing railway, provided that the routes so laid out by the said board and the railway so constructed by it shall so pass over or under or at the side of such existing railway as not to interfere with its operation.

(There is no enacting clause to this statute in the official edition.)

LAWS OF 1896.**Chapter 729.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled, "An Act to provide for rapid transit railways in cities of over one million inhabitants," as amended by chapters one hundred and two and five hundred and fifty-six of the laws of eighteen hundred and ninety-two, as amended by chapters five hundred and twenty-eight and seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, as amended by chapter five hundred and nineteen of the laws of eighteen hundred and ninety-five.

Accepted by the city.

Became a law May 19, 1896, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. (Amends, in minor respects, Section 6 of the Rapid Transit Act, as theretofore amended as to the preparation of plans and the provision for sub-surface conductors.)

§ 2. Section thirty-three of said act as amended by section nine of chapter five hundred and nineteen of the laws of eighteen hundred and ninety-five, is hereby amended to read as follows:

§ 33. Wherever or whenever the route selected by the said board of rapid transit railroad com-

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missioners for the construction of such railway shall intersect, cross or coincide with any railway track or tracks occupying the surface of any street or avenues, or the construction or operation of said railway shall interfere with any pipes, sewers, subways, or underground conduits or ways, any corporation organized under this act, or any contractor or person constructing any railway or part of a railway under any contract made with the board of rapid transit railroad commissioners, is hereby authorized, for the purpose of constructing the said work, to remove the track or tracks of any such surface railway or railways, or any such pipes, sewers, subways, or underground conduits or ways, but the same shall be done in such manner as to interfere as little as possible with the practical operation of workings of such surface railway or railways, or the works or business of the owners of any such pipes, sewers, subways, or underground conduits or ways, and upon the construction of such railways built under and in conformity with the provisions of this act, where such removals or changes have been made, said track or tracks, pipes, sewers, subways or underground conduits or ways shall be restored as nearly as may be to the condition in which they were previous to the construction of any such railway built under the provisions of this act, and any damages which such company or companies or owners may sustain shall be ascertained by a commission to be appointed the same as in the case where lands are taken for the purpose of a railway route or routes as hereinbefore provided in this act. For the purpose of the construction or operation of any railway under the provisions of this act, the board of

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rapid transit railroad commissioners may remove or cause to be removed, any pipes, sewers, subways or underground conduits or ways underneath any street, highway, park, or public place; provided, however, that the same shall be replaced as soon as practicable, either in the same position as before or in a secure and convenient position underneath such street, highway or public place, or underneath such other street, highway or public place as may be approved by the head of the department of public works of the city. Provided, however, that nothing in this section contained shall authorize the permanent removal from any street, highway, park or public place of any subways or conduits for the reception of electrical conductors which shall have been placed in such street, highway or public place prior to the construction of the rapid transit railroad. All such removals and restorations shall be made at the proper cost and charge of such corporation, contractor or person as may have made such removals, but subject to the provision of its, his or their contract, if any, with the board of rapid transit railway commissioners. Nothing contained in this act shall authorize any corporation formed thereunder to use the tracks of any horse railway. For the purpose of facilitating construction, and to diminish the period of occupancy of any street for the transportation of material, any contractor acting under a contract made in pursuance of this act, or of any act supplementary hereto or amendatory hereof, may, with the approval of the board of rapid transit railroad commissioners, lay upon or over the surface of any street, temporary tramways, to be used only for the removal of excavated

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materials or the transportation of material for use in the construction; provided, however, that any such tramway shall be forthwith removed upon the direction of the board of rapid transit railroad commissioners; and provided, further, that this provision shall not be construed to authorize the construction or operation of any street railroad or to grant to any corporation, association or individual the right to lay down railroad tracks.

§ 3. Section thirty-four of said act added thereto by section nine of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, as amended by section ten of chapter five hundred and nineteen of the laws of eighteen hundred and ninety-five, is hereby amended to read as follows:

§ 34. In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or to adopt other or different routes,

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plans and specifications for such railway or railways; provided, always, that in all cases in which any such change or modification shall be of such character as to require the consents thereto referred to in section five of this act; and in all cases where other or different routes or general plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. As soon as such consents, where necessary, shall have been obtained, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfill and carry out said contract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or made* by separate contracts, executed from time to time, provide for the construction of parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road

*So in original.

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or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population may in the judgment of said board require. The board may also, in a contract for a part of such a road, insert a provision that, at a future time, upon the requirement of the board, the contractor shall construct the remainder or any part of the remainder of said road, as the growth of population or the interests of the city may, in the judgment of the board, require, and may, in such contract, insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the contractor for such additional construction, and to the end of such ascertainment, may provide for arbitration or for determination by a court of the amount of such compensation, or of any other details of construction which shall not be prescribed in the contract, but which shall be deemed necessary or convenient by said board. Any such contract may provide, if the public interests shall, in the opinion of the board, justify the provision, that the construction of any section or portion of the road, may, with the consent of the board, be suspended during the term of operation of the railroad as hereinafter mentioned, or any part of such term, provided, that during such terms or part of term the contractor shall use, in lieu of such portion of the road, a railroad owned or leased by the contractor or a portion or section thereof, which shall, with the railroad or portion of railroad constructed by it under its contract with the board, form a continuous and convenient route. Such contract shall also provide that the person, firm

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or corporation so contracting to construct said road or roads shall, at his, or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions as to the rates or fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board; provided, that in case the contract shall provide for construction at different times or at intervals of time of different parts of a road, or if the contract shall provide for the use by the contractor of an existing railroad as part of continuous route as aforesaid, then and in any such case the board of rapid transit railroad commissioners may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Such contract shall further provide, by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages or otherwise, on the part of the owner, abutting owner or other person. Such contract shall further provide that the person, firm or corporation so contracting to con-

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struct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds; provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. And provided, further, that the said contract may, in the discretion of the said board, provide that the payment of the said further sum of not less than one per centum upon the amount of said bonds as aforesaid, shall begin at a date not more than five years after the date at which the payment of rental shall begin, and that the said annual rate, instead of one per centum, may be a rate not less than one-half per centum for a further period not exceeding five years; but in case the contractor shall, during any year in which the said payment of one per centum shall be suspended or reduced as aforesaid, earn a greater profit upon his, its or their net capital invested in the enterprise than five per centum, then the surplus of his, its or their earnings for such year up to the extent of at least one per centum shall be paid as rental as aforesaid. Such rental and the term for the operation of said road shall begin, as to said road, or any section thereof, when the same shall be declared by the

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board of rapid transit railroad commissioners to be completed and ready for operation. For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds heretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Said contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same, upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city at such valuation, or a percentage of the same, should said lease not be so renewed at any time.

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Said contract may provide for the construction of said road in sections, and, except as herein otherwise provided, shall specify when the construction of said road, or sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of said road shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify in the aggregate in double the amount of said bond. Said bond shall be a continuing security, and shall provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation of all of the conditions, covenants and requirements specified and provided for in said contract. The said contracting person, firm or corporation shall also, simultaneously with the execution and delivery of said contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars in cash or in securities of a value not less than one million dollars, which securities shall be of the character of those in which the savings banks of this state are authorized by law to invest moneys, and shall be approved by the board of rapid transit railroad commissioners, which cash or securities shall, under such terms and conditions as shall be provided in the said contract, be further security for the faithful performance by

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such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance of such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of six of the members of said board, relieve from such lien any of the property to which the same may attach, upon receiving additional security, which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. Upon the completion of the construction and equipment of said road to the satisfaction of said board, and when the operation of the same shall have commenced pursuant to said contract, it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation the said sum

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of one million dollars in cash or the said securities so to be deposited as above provided, and the said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they or it shall have contracted to pay to said city for the use of said road the sum which shall be equal, as the case may be, either to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road, or to the interest, dividends or other income which said city shall have received from the said securities. The said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance

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and operation, including the keeping in repairs of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then, and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad commissioners, concurred in by six members of said board. It shall be deemed to be part of every such contract that, in case the board of rapid transit railroad commissioners shall cease to exist, the legislature may provide what public officer or officers of the city shall exercise the powers and duties belonging to the board of rapid transit railroad commissioners under or by virtue of any such contract, and that in default of such provisions, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct or operate the railway according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the board of rapid transit railroad commissioners may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and

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just protection of the rights of the city; or may, upon such terms as to the board of rapid transit railroad commissioners seem just, and with such person or corporation as to the said board may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default. Any railroad corporation organized under the laws of this state, or any existing railway corporation owning or actually operating a railroad wholly or in part within the limits of the city in and for which said board has power to act, or any corporation organized under the business corporations laws of this state, and approved by the said board of rapid transit railroad commissioners, shall be competent and is hereby authorized to enter into a contract for the construction and operation of any railway pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. Where in this section the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term of the appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

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§ 4. Section thirty-five of said act, as added by chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, is hereby amended so as to read as follows:

§ 35. The equipment to be supplied by the person, firm or corporation operating such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power-houses, and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road.

§ 5. (Amends Section 39 of the Rapid Transit Act, added by the amendment of 1894 and as amended in 1895, by providing that the contractor may acquire necessary real property or interests therein in the manner outlined, and that, when the necessity therefor shall have been approved by the Board, such property shall be deemed to be required for a public purpose.

Due probably to an error of the engrosser, the enacting clause is numbered § 8. It should be § 6.)

§ 8. This act shall take effect immediately.

LAWS OF 1900.**Chapter 616.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one entitled "An act to provide for rapid transit railways in cities of over one million inhabitants" and otherwise with respect to such railways in such cities.
Accepted by the city.

Became a law, April 23, 1900, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. (Further amends Section 4 of the act of 1891, as theretofore amended, as to adoption of plans and routes by providing for rapid transit lines in addition to those then existing or proposed.)

§ 2. The provisions of the said section four of the said act shall, with reference to any rapid transit railroad for which routes and a general plan have been heretofore adopted by the board of rapid transit railroad commissioners of any city and for the municipal construction of which a contract has been heretofore made by any city, be deemed to have been in full force as hereby amended from before the time when the routes and general plan for such railroad or railroads were so adopted by the board of rapid transit railroad commissioners.

§ 3. Section thirty-four of the said act is hereby amended so as to read as follows:

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§ 34. In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or from time to time and with or without reference to former routes or plans to adopt other or different or additional routes, plans and specifications for such railway or railways, provided always, that in all cases in which any such change or modification shall be of such character as to require the consents thereto referred to in section five of this act; and in all cases where other or different routes or general plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. If any city has been or shall have been formed by the union or consolidation of one or more cities and other territory, and if in or for one of such cities so consolidated or united there shall have been a board of rapid transit railroad commissioners as provided in this act, the board of rapid transit railroad commissioners for the said city formed by such union

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or consolidation shall have for and within such city so formed all the powers, and be subject to all the duties and responsibilities, which at the time of such union or consolidation belonged to the board of rapid transit railroad commissioners of the former city so as aforesaid possessing such board for or in or with respect to such former city. If in such former city the vote of the qualified electors thereof shall have been for municipal construction of rapid transit road as prescribed in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, then the system of municipal construction of rapid transit railways provided for in this act and all of the provisions with respect thereto in this act contained shall be applicable to, and in full force within, all the districts or boroughs and throughout the entire area of the said city formed by such union or consolidation. The board of rapid transit railroad commissioners for any city shall, prior to the time of the final grant of any franchise under the provisions of this act or the making of a contract for construction and operation of any railroad under the provisions of this act have power to rescind and revoke any resolution or resolutions of such board adopting any routes or general plan for a rapid transit railroad adopted by such board and, in the discretion of such board, in lieu thereof to adopt new routes and general plan. Every such rescindment or revocation which shall have been heretofore made shall be deemed to have been lawful and authorized by this act as the same was prior to the present amendment hereof. As soon as such consents, where necessary, shall have been obtained for any rapid transit railroad or railroads,

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and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfil and carry out said contract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may in any case contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population may in the judgment of said board require. The board may also, in a contract for a part of any such rapid transit railroad insert a provision that, at a future time, upon the requirement of the board, the contractor shall construct the remainder or any part of the remainder of said road, as the growth of population or the interests of the city may, in the judgment of the board, require, and may, in such contract, insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the

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contractor for such additional construction, and to the end of such ascertainment, may provide for arbitration or for determination by a court of the amount of such compensation, or of any other details of construction which shall not be prescribed in the contract, but which shall be deemed necessary or convenient by said board. Any such contract may provide, if the public interest shall, in the opinion of the board, justify the provision, that the construction of any section or portion of the railroad included in such contract, may, with the consent of the board, be suspended during the term of operation of the railroad as hereinafter mentioned, or any part of such term; provided, that during such term or part of term the contractor shall use, in lieu of such portion of the road, a railroad owned or leased by the contractor or a portion or section thereof, which shall, with the railroad or portion of railroad constructed by it under its contract with the board, form a continuous and convenient route. Every such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his, or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions as to the rates or fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board; provided, that in case the contract shall provide for construction at different

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times or at intervals of time of different parts of a road, or if the contract shall provide for the use by the contractor of an existing railroad as part of continuous route as aforesaid, then and in any such case the board of rapid transit railroad commissioners may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Every such contract shall further provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages or otherwise, on the part of the owner, abutting owner, or other person. Every such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds; provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than

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lands acquired in fee. And provided, further, that the said contract may, in the discretion of the said board, provide that the payment of the said further sum of not less than one per centum upon the amount of said bonds as aforesaid, shall begin at a date not more than five years after the date at which the payment of rental shall begin, and that the said annual rate, instead of one per centum, may be a rate not less than one-half per centum for a further period not exceeding five years; but in case the contractor shall, during any year in which the said payment of one per centum shall be suspended or reduced as aforesaid, earn a greater profit upon his, its or their net capital invested in the enterprise than five per centum, then the surplus of his, its or their earnings for such year up to the extent of at least one per centum shall be paid as rental as aforesaid. Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, when the same shall be declared by the board of rapid transit railroad commissioners to be completed and ready for operation. For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds theretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and

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the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund, for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Any such contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same, upon such terms and conditions as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Any such contract may provide for the construction of said road in sections, and, except as herein otherwise provided, every such contract shall specify when the construction of the railroad included therein or the several sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of the railroad or railroads included in any such contract shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require,

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and with sureties to be approved by said board, who shall justify each in double the amount of his liability upon said bond. Said bond shall be a continuing security, and shall provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation of all the conditions, covenants and requirements specified and provided for in said contract. In lieu of said continuing bond such contracting person, firm or corporation may, upon the approval of the said board, deposit with the comptroller or other chief financial officer of such city cash equal in amount to the entire amount of the said bond or securities which are lawful for the investment of the funds of savings banks within this state and are worth not less than the entire amount of such bond. If such bond shall have been given then after the deposit of cash and securities in lieu thereof as aforesaid, and the approval thereof by the said board, the said bond shall be surrendered by the said city to the said contracting person, firm or corporation duly cancelled by the comptroller or other chief financial officer of the said city. In the event of the deposit of cash or securities as aforesaid, the contract may provide for the payment to the contractor of the income of such securities or of interest upon such monies at a rate not higher than the highest rate received by the city upon the deposit of its funds with banks, and may also provide for withdrawal of securities so deposited upon deposit of cash or securities of the same value, provided that all such securities shall be such as are so lawful for the

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investment of the funds of savings banks. The said contracting person, firm or corporation shall also simultaneously with the execution and delivery of every such contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars in cash or in securities of a value not less than one million dollars, which securities shall be of a character of those in which the savings banks of this state are authorized by law to invest moneys, and shall be approved by the board of rapid transit railroad commissioners, which cash or securities shall, under such terms and conditions as shall be provided in the said contract, be further security for the faithful performance by such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad com-

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missioners may, however, from time to time, by a concurrent vote of six of the members of said board, relieve from such lien, any of the property to which the same may attach, upon receiving additional security, which may be deemed by said board so voting to be equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. The said board may in or by any such contract and its discretion require, and this act, as the same was prior to the present amendment thereof shall be deemed to have authorized the said board to have heretofore required any other security upon any such contract. Upon the completion of the construction and equipment of the railroad or railroads provided in any such contract to the satisfaction of said board, and when the operation of the same shall have commenced pursuant to said contract, it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation said sum of one million dollars in cash or the said securities so to be deposited as above provided as security for construction and equipment, and the said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they or it shall have contracted to pay to said city for the use of said road a sum which shall be equal, as the case may be, either to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road, or to the interest, dividends or other income which said city shall have received from the said securities. The

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said contract shall further provide that in case of default in paying the annual sum or rental therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repairs of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue (but in the case of any bond hereafter executed each bondsman only to the extent of the liability expressly assumed by him upon the bond) jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall

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be assigned without the written consent of the said board of rapid transit railroad commissioners, concurred in by six members of said board. It shall be deemed to be part of every such contract that, in case the board of rapid transit railroad commissioners shall cease to exist, the legislature may provide what public officer or officers of the city shall exercise the powers and duties belonging to the board of rapid transit railroad commissioners under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct or operate the railway according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the board of rapid transit railroad commissioners may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the board of rapid transit railroad commissioners seem just, and with such person or corporation as to the said board may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new

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contract, and for all other damages sustained by the city by reason of such default. The said board may by any such contract determine when and how the work of construction of the rapid transit railroad or railroads included therein shall proceed. Any railroad corporation organized under the laws of this state, or any existing railway corporation owning or actually operating a railway wholly or in part within the limits of the city in and for which said board has power to act, or any corporation organized under the business corporations laws of this state, and approved by the said board of rapid transit railroad commissioners, shall be competent and is hereby authorized to enter into a contract for the construction and operation of any railway pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. Where in this section the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

§ 4. Section thirty-five of the said act is hereby amended so as to read as follows:

§ 35. The equipment to be supplied by the person, firm or corporation operating any such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or trans-

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mission of motive power and including all power-houses, and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road.

§ 5. This act shall take effect immediately.

LAWS OF 1901.**Chapter 587.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Became a law, April 27, 1911, with the approval of the Governor. Passed, a majority being present.

This amends Sections 39 and 55 of the act of 1891, as theretofore amended, relative to acquisition of property and rights necessary for construction, and payment of compensation therefor.

LAWS OF 1902.

Chapter 533.

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Accepted by the city

Became a law, April 11, 1902, with the approval of the Governor. Passed, three-fifths being present.

This amends Section 44 of the act of 1891, as theretofore amended, relative to the notice to be given of proceedings to acquire property and rights therein necessary for construction.

LAWS OF 1902.**Chapter 542.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," as amended by chapters one hundred and two and five hundred and fifty-six of the laws of eighteen hundred and ninety-two, as amended by chapters five hundred and twenty-eight and seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, as amended by chapter five hundred and nineteen of the laws of eighteen hundred and ninety-five, as amended by chapter seven hundred and twenty-nine of the laws of eighteen hundred and ninety-six, as amended by chapter six hundred and sixteen of the laws of nineteen hundred, as amended by chapter five hundred and eighty-seven of the laws of nineteen hundred and one.

Accepted by the city.

Became a law, April 11, 1902, with the approval of the Governor. Passed, three-fifths being present.

This amends Section 6 of the act of 1891, as theretofore amended, relative to the preparation of detail plans and the inclusion therein of provisions for subsurface conductors.

LAWS OF 1902.**Chapter 544.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants."

Accepted by the city.

Became a law, April 11, 1902, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section thirty-four of chapter four of the laws of eighteen hundred and ninety-one entitled "An act to provide for rapid transit railways in cities of over one million inhabitants" as amended by chapter seven hundred and fifty-two of the laws of eighteen hundred ninety-four, chapter five hundred nineteen of the laws of eighteen hundred ninety-five and chapter six hundred sixteen of the laws of nineteen hundred, is hereby amended to read as follows:

§ 34. In case the people shall determine by vote, as provided in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, that any such railway or railways shall be constructed for and at the expense of such city, then and in that event it shall be the duty of said board to consider the routes, plans and specifications, if any, previously

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laid out and adopted by them or their predecessors, and for which the consents have been obtained referred to in section five of this act; and either to proceed with the construction of such railway or railways, and provide for the operation of the same, as hereinafter provided, or to change and modify the said routes, plans or specifications in such particulars as to said board may seem to be desirable, or from time to time and with or without reference to former routes or plans to adopt other or different or additional routes, plans and specifications for such railway or railways, provided always, that in all cases in which any such change or modification shall be of such character as to require the consents thereto referred to in section five of this act; and in all cases where other or different routes or general plans may have been so adopted the said board shall proceed to secure the consents required to be obtained by section five of this act as therein set forth. If any city has been or shall have been formed by the union or consolidation of one or more cities and other territory, and if in or for one of such cities so consolidated or united there shall have been a board of rapid transit railroad commissioners as provided in this act, the board of rapid transit railroad commissioners for the said city formed by such union or consolidation shall have for and within such city so formed all the powers, and be subject to all the duties and responsibilities, which at the time of such union or consolidation belonged to the board of rapid transit railroad commissioners of the former city so as aforesaid possessing such board for or in or with respect to such former city. If in such

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former city the vote of the qualified electors thereof shall have been for municipal construction of rapid transit road as prescribed in sections twelve and thirteen of chapter seven hundred and fifty-two of the laws of eighteen hundred and ninety-four, then the system of municipal construction of rapid transit railways provided for in this act and all of the provisions with respect thereto in this act contained shall be applicable to, and in full force within, all the districts or boroughs and throughout the entire area of the said city formed by such union or consolidation. The board of rapid transit railroad commissioners for any city shall, prior to the time of the final grant of any franchise under the provisions of this act or the making of a contract for construction and operation of any railroad under the provisions of this act have power to rescind and revoke any resolution or resolutions of such board adopting any routes or general plan for a rapid transit railroad adopted by such board and, in the discretion of such board, in lieu thereof to adopt new routes and general plan. Every such rescindment or revocation which shall have been heretofore made shall be deemed to have been lawful and authorized by this act as the same was prior to the present amendment hereof. As soon as such consents, where necessary, shall have been obtained for any rapid transit railroad or railroads, and the detailed plans and specifications have been prepared as provided in section six of this act, the said board, for and in behalf of said city, shall enter into a contract with any person, firm or corporation, which in the opinion of said board shall be best qualified to fulfil and carry out said con-

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tract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised, and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions, not inconsistent with the aforesaid plans and specifications, as said board shall determine to be best for the public interests. And said board may in any case contract for the construction of the whole road, or all the roads provided for by the aforesaid plans in a single contract, or may by separate contracts, executed from time to time, provide for the construction of parts of said road or roads or for the construction at first of two or more tracks over a part or parts of such road or roads and afterwards of one or more additional tracks over a part or parts of such road or roads as the necessities of said city and the increase of its population may in the judgment of said board require. The board may also, in a contract for a part of any such rapid transit railroad insert a provision that at a future time, upon the requirement of the board, the contractor shall construct the remainder or any part of the remainder of said road, as the growth of the population or the interests of the city may, in the judgment of the board, require, and may, in such contract, insert a provision of a method for fixing and ascertaining at such future time the amount to be paid to the contractor for such additional construction, and to the end of such ascertainment, may provide for arbitration or for determination by a court of the amount of such compensation, or of any other details of construction which shall not be pre-

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scribed in the contract, but which shall be deemed necessary or convenient by said board. Any such contract may provide, if the public interest shall, in the opinion of the board, justify the provision, that the construction of any section or portion of the railroad included in such contract may, with the consent of the board, be suspended during the term of operation of the railroad as herein-after mentioned, or any part of such term; provided, that during such term or part of term the contractor, shall use, in lieu of such portion of the road, a railroad owned or leased by the contractor or a portion or section thereof, which shall, with the railroad or portion of railroad constructed by it under its contract with the board, form a continuous and convenient route. Every such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall, at his, or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions as to the rates or fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests, and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board; provided, that in case the contract shall provide for construction at different times or at intervals of time of different parts of a road, or if the contract shall provide for the use by the contractor of an existing railroad as part of continuous route as aforesaid, then and in any

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such case the board of rapid transit railroad commissioners may, in its discretion, prescribe periods for the operation of the different parts of said road so that at one period of time in the future the board may be enabled to make a single operating contract or lease of the entire road. Every such contract shall further provide by proper stipulations and covenants on the part of the said city, that the said city shall secure and assure to the contractor, so long as the contractor shall perform the stipulations of the contract, the right to construct and to operate the road as prescribed in the contract, free of all right, claim or other interference, whether by injunction, suit for damages or otherwise, on the part of the owner, abutting owner, or other person. Every such contract shall further provide that the person, firm or corporation so contracting to construct, maintain and operate said road shall annually pay into the treasury of said city, as rental for the use of said road, a sum which shall not, except as hereinafter provided, be less than the annual interest upon the bonds to be issued by said city for the construction of said road as hereinafter provided for, and in addition to said interest, a further sum which shall be equal to a percentage of not less than one per centum upon the whole amount of said bonds; provided, that in estimating such annual interest and additional percentage there shall be deducted from the amount of said bonds the amount thereof issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. And provided, further, that the said contract may, in the discretion of the said board, provide that the payment of the said further sum of not less

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than one per centum upon the amount of said bonds as aforesaid, shall begin at a date not more than five years after the date at which the payment of rental shall begin, and that the said annual rate, instead of one per centum, may be a rate not less than one-half per centum for a further period not exceeding five years; but in case the contractor shall, during any year in which the said payment of one per centum shall be suspended or reduced as aforesaid, earn a greater profit upon his, its or their net capital invested in the enterprise than five per centum, then the surplus of his, its or their earnings for such year up to the extent of at least one per centum shall be paid as rental as aforesaid. Such rental and the term for the operation of the railroad included in any such contract shall begin, as to said road, or any section thereof, when the same shall be declared by the board of rapid transit railroad commissioners to be completed and ready for operation. For the purpose of estimating such one per centum per annum upon the ascertainment of the amount of such rental, there shall be included such portion of the said bonds as shall have been issued to pay interest on bonds theretofore issued under the provisions of this act, except bonds issued to pay for rights, terms, easements, privileges or property other than lands acquired in fee. The aforesaid annual rental shall be paid at such times during each year as said board shall require, and shall be applied first to the payment of the interest on said bonds, as the same shall accrue and fall due, and the remainder of said rental not required for the payment of said interest shall be paid into the sinking fund,

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for the payment of the city debt, if there shall be such sinking fund in said city, or, if there be none such, then said balance of said rental shall be securely invested, and, with the annual accretions of interest thereon, shall constitute a sinking fund for the payment and redemption at maturity of the bonds issued, as hereinafter provided. Any such contract may also provide for a renewal or renewals of the lease of said road upon the expiration of the original term and of any renewals of the same, upon such terms and conditions, as to said board may seem just and proper, and may also contain provisions for the valuation of the whole or a part of the property of said contracting person, firm or corporation, employed in and about the equipment, maintenance and operation of said road, and for the purchase of the same by the city, at such valuation, or a percentage of the same, should said lease not be so renewed at any time. Any such contract may provide for the construction of said road in sections, and, except as herein otherwise provided, every such contract shall specify when the construction of the railroad included therein or the several sections of the same shall be commenced, and, in each case, the date of completion. It shall also state the date on which the operation of the road, or of any section thereof, shall commence. The person, firm or corporation so contracting for the construction, equipment, maintenance and operation of the railroad or railroads included in any such contract shall give a bond to said city, in such amount as said board of rapid transit railroad commissioners shall require, and with sureties to be approved by said board, who shall justify each in double the amount of his

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liability upon said bond. Said bond shall be a continuing security, and shall provide for the prompt payment by said contracting person, firm or corporation, of the amount of annual rental specified in the aforesaid contract, and also for the faithful performance by said contracting person, firm or corporation of all the conditions, covenants and requirements specified and provided for in said contract. In lieu of said continuing bond such contracting person, firm or corporation may, upon the approval of the said board, deposit with the comptroller or other chief financial officer of such city cash equal in amount to the entire amount of the said bond or securities which are lawful for the investment of the funds of savings banks within this state and are worth not less than the entire amount of such bond. If such bond shall have been given then after the deposit of cash and securities in lieu thereof as aforesaid, and the approval thereof by the said board, the said bond shall be surrendered by the said city to the said contracting person, firm or corporation duly cancelled by the comptroller or other chief financial officer of the said city. In the event of the deposit of cash or securities as aforesaid, the contract may provide for the payment to the contractor of the income of such securities or of interest upon such moneys at a rate not higher than the highest rate received by the city upon the deposit of its funds with banks, and may also provide for withdrawal of securities so deposited upon deposit of cash or securities of the same value, provided that all such securities shall be such as are so lawful for the investment of the funds of savings banks. The said contracting person, firm or corporation shall also

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simultaneously with the execution and delivery of every such contract, deposit with the comptroller or other chief financial officer of such city the sum of one million dollars in cash or in securities of a value not less than one million dollars, which securities shall be of the character of those in which the savings banks of this state are authorized by law to invest moneys, and shall be approved by the board of rapid transit railroad commissioners, which cash or securities shall, under such terms and conditions as shall be provided in the said contract, be further security for the faithful performance by such contracting person, firm or corporation of all the covenants, conditions and requirements specified and provided for in said contract relating to the construction and equipment of said road, and the city in and for which said road shall be constructed shall also have a first lien upon the rolling stock and other property of said contracting person, firm or corporation, constituting the equipment of said road and used or intended for use in the maintenance and operation of the same, as further security for the faithful performance by such contracting person, firm, or corporation of the covenant, conditions and agreements of said contract, on his, their, or its part to be fulfilled and performed, and in case of the breach of any such covenant, condition and agreement said lien shall be subject to foreclosure by action, at the suit of such city, in the same manner, as far as may be, as is then provided by law in the case of foreclosure by action of mortgages on real estate. The said board of rapid transit railroad commissioners may, however, from time to time, by a concurrent vote of six of the members of said board, relieve

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from such lien, any of the property to which the same may attach, upon receiving additional security which may be deemed by said board so voting to be the equivalent of that which it is proposed to release and otherwise upon such terms as to such board so voting shall seem just. The said board may in or by any such contract and in its discretion require, and this act, as the same was prior to the present amendment thereof shall be deemed to have authorized the said board to have heretofore required any other security upon any such contract. Upon the completion of the construction and equipment of the railroad or railroads provided in any such contract to the satisfaction of said board, and when the operation of the same shall have commenced pursuant to said contract, it shall be the duty of the comptroller or other chief financial officer to pay to the said contracting person, firm or corporation said sum of one million dollars in cash or the said securities so to be deposited as above provided as security for construction and equipment, and the said contracting person, firm or corporation shall also be then entitled to be credited upon the rental which he, they or it shall have contracted to pay to said city for the use of said road a sum which shall be equal, as the case may be, either to the interest on the sum of one million dollars for the time of such deposit at the rate of interest provided for in the bonds which shall have been issued and sold by the city to provide for the construction of said road, or to the interest, dividends or other income which said city shall have received from the said securities. The said contract shall further provide that in case of default in paying the annual sum or rental

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therein provided for, or in case of the failure or neglect on the part of said contracting person, firm or corporation, faithfully to observe, keep and fulfill the conditions, obligations and requirements of said contract, the said city, by its board of rapid transit railroad commissioners, may take possession of said road and the equipment thereof, and as the agent of said contracting person, firm or corporation, either maintain and operate said road, or enter into a contract with some other person, firm or corporation for the maintenance and operation thereof, retaining out of the proceeds of such operation, after the payment of the necessary expenses of operation and maintenance, the annual rental hereinbefore referred to, and paying over the balance, if any, to the person, firm or corporation with whom the first contract above mentioned was made, and if such proceeds of the operation of said road, after the payment of the necessary expenses of maintenance and operation, including the keeping in repairs of the rolling stock and other equipment, shall in any year be less than the annual rental hereinbefore referred to and provided in the first contract, then, and in that case, the said contracting person, firm or corporation, and his or its bondsmen, shall be and continue (but in the case of any bond hereafter executed each bondsman only to the extent of the liability expressly assumed by him upon the bond) jointly and severally liable to the aforesaid city for the amount of such deficiency, until the end of the full term for which the said first contract was originally made. No contract entered into under authority of this act shall be assigned without the written consent of the said board of rapid transit railroad

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commissioners, concurred in by six members of said board. The said contracting person, firm or corporation, with such written consent and upon such terms and conditions as the said board shall prescribe, may either assign the whole of such contract or separately the right or obligation to maintain and operate the said road or roads for the remainder of the term of years specified in such contract and all rights with respect to such maintenance and operation, or included in the leasing provisions of such contract, but subject to all the terms and conditions therein stated; provided, however, that the assignee or assignees shall, in and by such assignment, assume all of the obligations of the original contractor under or with respect to such leasing provisions and all obligations which relate in any way to such operation and maintenance, and provided, further, that the said board before giving its consent shall be satisfied that the pecuniary responsibility of the assignee or assignees shall be no less than that of such original contractor; and provided, further, that all of the security or securities which the city shall have received for the performance by the original contractor of such leasing provisions and of all provisions of the contract with respect to such operation and maintenance shall continue in full force as provided in such contract, or any modification thereof, as security for the performance by such assignee of all obligations of the contractor under or with respect to such leasing provisions and such maintenance or operation. It shall be deemed to be part of every such contract that, in case the board of rapid transit railroad commissioners shall cease to exist, the legislature

Chapter 544, Laws of 1902.

may provide what public officer or officers of the city shall exercise the powers and duties belonging to the board of rapid transit railroad commissioners under or by virtue of any such contract, and that in default of such provision, such powers and duties shall be deemed to be vested in the mayor of the city. Every such contract shall provide that if the contracting person, firm or corporation shall fail to construct or operate the railway according to the terms of the contract, and shall, after due notice of its default, omit for more than a reasonable time to comply with the provisions of such contract, the board of rapid transit railroad commissioners may bring an action in the name and in behalf of the city to forfeit and vacate all the rights of such contracting person, firm or corporation under such contract, and for damages and otherwise as may be necessary for the sufficient and just protection of the rights of the city; or may, upon such terms as to the board of rapid transit railroad commissioners seem just, and with such person or corporation as to the board may seem proper, make another operating contract and lease of the said road for the residue of the term of the contractor in default; and may bring action in the name and on behalf of the city to recover from the contractor the amount due from the contractor, less the amount which shall have been received by the city, under or by virtue of such new contract, and for all other damages sustained by the city by reason of such default. The said board may by any such contract determine when and how the work of construction of the rapid transit railroad or railroads included therein shall proceed. Any existing railway corpora-

Chapter 544, Laws of 1902.

tion owning or actually operating a railway wholly or in part within the limits of the city in and for which said board has power to act, and approved by the said board of rapid transit railroad commissioners, shall be competent and is hereby authorized to enter into any contract for the construction and operation of any railway pursuant to the provisions of this chapter; or, after such a contract shall have been made, shall be competent and is hereby authorized, with the approval of the said board, to contract with the original contractor or his assignee or assignees for the maintenance and operation (including the equipment thereof) of any railway constructed or in process of construction pursuant to the provisions of this chapter, and shall have all the powers necessary to the due performance of such contract. A corporation may be organized under the railroad law of this state, for the purpose of undertaking the construction and operation of a railway pursuant to the provisions of this act, or for the purpose of maintaining and operating a railway (including the equipment thereof) already constructed or in process of construction pursuant to the provisions of this chapter, or for both such purposes; and any corporation so organized, upon the approval in writing of the said board of rapid transit railroad commissioners, shall, in addition to the powers conferred by the general act under which such company is organized be empowered and is hereby authorized to enter into any contract permitted by law for the construction and operation, or for the maintenance and operation when constructed (including the equipment thereof if desired), as the case may be, of any such railway

Chapter 544, Laws of 1902.

constructed or to be constructed at the expense of the city as in this act provided. The certificate of such approval shall be filed in the office of the secretary of state, and a copy thereof certified to be a true copy by the secretary of state or his deputy, shall be evidence of the fact therein stated. A corporation so organized shall not be required to procure the consent of the board of railroad commissioners of the state as provided for in section fifty-nine of the railroad law. Where in this section the consents referred to in section five of this act are mentioned, they shall be construed to include any consent given by the commissioners appointed by the general term or appellate division of the supreme court, and confirmed by the said general term or appellate division in lieu of the consent of property owners as hereinbefore provided.

§ 2. This act shall take effect immediately.

LAWS OF 1902.**Chapter 584.**

AN ACT to amend chapter four of the laws of eighteen hundred and ninety-one, entitled "An act to provide for rapid transit railways in cities of over one million inhabitants," and making provisions with respect to tunnel and other railroads.

Accepted by the city.

Became a law, April 14, 1902, with the approval of the Governor. Passed, three-fifths being present.

This amends, in minor respects, Section 32 of the act of 1891, as theretofore amended, relative to the acquisition of franchises for extensions or additional tracks by corporations owning or operating a railroad in the city.

VARYING FORMS OF PERTINENT NEW YORK TAX STATUTES.

LAWS OF 1896.

Chapter 908.

AN ACT in relation to taxation, constituting chapter twenty-four of the general laws.

Became a law May 27, 1896, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER XXIV OF THE GENERAL LAWS.

The Tax Law.

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ARTICLE IX.

CORPORATION TAX.

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§ 182. FRANCHISE TAX ON CORPORATIONS.—Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount, at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year ending with the thirty-first day of October, if the dividends amount to six or more than six per cen-

Chapter 908, Laws of 1896.

tum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half mills upon each dollar of the appraised capital employed within the state. If such corporation, joint stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six, or more than six per centum, upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon, amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum. Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country, shall pay a like tax for the privilege of exercising its

Chapter 908, Laws of 1896.

corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state.

* * * * *

§ 184. ADDITIONAL FRANCHISE TAX ON TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS.—Every corporation and joint-stock association formed for steam surface railroad, canal steamboat, ferry, express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and all other transportation corporations not liable to taxes under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character. All settlements for such taxes heretofore based by the comptroller upon gross earnings excluding earnings from interstate business, have been ratified and confirmed, except that the accounts for taxation under section six of chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, for the years eighteen hundred and ninety-two and eighteen hundred and ninety-three, shall be settled and adjusted

Chapter 558, Laws of 1901.

by the comptroller by excluding the earnings of an interstate character as provided by this section.

* * * * *

§ 281. WHEN TO TAKE EFFECT.—This chapter shall take effect June fifteenth, eighteen hundred and ninety-six.

LAWS OF 1901.**Chapter 558.**

AN ACT to amend the tax law relative to foreign and domestic corporations.

Became a law, April 26, 1901, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

§ 2. Section one hundred and eighty-two of said chapter is hereby amended to read as follows:

§ 182. Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually an annual tax to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount, at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year, ending with the thirty-first day of October, if the dividends amount to six or more

Chapter 558, Laws of 1901.

than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half mills upon each dollar of the appraised capital employed within this state. If such corporation, joint stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; provided, however, that a street surface railroad corporation or a steam railroad corporation, or an elevated railroad corporation owning in a city a street surface railroad or an

Chapter 558, Laws of 1901.

elevated railroad not operated by steam, in cases where the street surface roads or elevated roads of said owning corporations are operated by another street surface railroad corporation under a lease or otherwise, in so far as the dividends made and declared upon the capital stock of the said owning corporations shall be paid from the gross earnings of the said operating corporation in the form of rent or otherwise, shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid from the moneys received in the form of rent or otherwise from the operating company in excess of four per centum upon the amount of its capital stock, provided, however, that nothing in this section shall relieve the said operating company of any of the liabilities imposed by section one hundred and eighty-five of this chapter. Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state.

* * * * *

§ 5. This act shall take effect immediately.

LAWS OF 1906.**Chapter 474.**

AN ACT to amend sections one hundred and eighty-one, one hundred and eighty-two, one hundred and eighty-three, one hundred and eighty-five and one hundred and ninety of the tax law in relation to the taxation of corporations.

Became a law, May 16, 1906, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

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§ 2. Section one hundred and eighty-two of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, as amended by chapter five hundred and fifty-eight of the laws of nineteen hundred and one, entitled "An act in relation to taxation constituting chapter twenty-four of the general laws" is hereby amended to read as follows:

§ 182. FRANCHISE TAX ON CORPORATIONS. For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint-stock company or association doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any

Chapter 474, Laws of 1906.

business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets do not exceed the liabilities, exclusive of capital stock, or

(2) The average price at which such stock sold during said year, did not equal or exceed its par value, or

(3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

Chapter 474, Laws of 1906.

(2) The average price at which such stock sold during said year is equal to or greater than the par value,

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

(1) The par value of such stock,

(2) The difference between the assets and liabilities, exclusive of capital stock,

(3) The average price at which such stock sold during said year.

If such corporation, joint-stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six, or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

Chapter 734, Laws of 1907.

(1) Upon which no dividend was made or declared, or

(2) Upon which the dividend or dividends made or declared did not amount to six per centum on the par value,

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

* * * * *

§ 6. This act shall take effect October thirty-first, nineteen hundred and six.

LAWS OF 1907.**Chapter 734.**

AN ACT to amend sections one hundred and eighty-two, one hundred and eighty-four, one hundred and eighty-six, one hundred and ninety, and one hundred and ninety-five of the tax law, in relation to the taxation of corporations.

Became a law, July 25, 1907, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and eighty-two of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, as amended by

Chapter 734, Laws of 1907.

chapter five hundred and fifty-eight of the laws of nineteen hundred and one, as amended by chapter four hundred and seventy-four of the laws of nineteen hundred and six, entitled "An act in relation to taxation, constituting chapter twenty-four of the general laws," is hereby amended to read as follows:

§ 182. FRANCHISE TAX ON CORPORATIONS.—For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

Chapter 734, Laws of 1907.

1. The assets do not exceed the liabilities, exclusive of capital stock, or

2. The average price at which such stock sold during said year, did not equal or exceed its par value, or

3. If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

1. The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

2. The average price at which such stock sold during said year is equal to or greater than its par value,

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

1. The par value of such stock,

2. The difference between the assets and liabilities, exclusive of capital stock,

3. The average price at which such stock sold during said year.

Chapter 734, Laws of 1907.

If such corporation, joint-stock company or association, shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six, or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock,

1. Upon which no dividend was made or declared, or

2. Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value,

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon

Chapter 73½, Laws of 1907.

each dollar of such capital stock at the average price at which said stock sold during the said year.

§ 2. Section one hundred and eighty-four of chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled "An act in relation to taxation, constituting chapter twenty-four of the general laws," is hereby amended to read as follows:

§ 184. ADDITIONAL FRANCHISE TAX ON TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS. Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and all other transportation corporations not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character.

* * * * *

§ 6. This act shall take effect immediately.

LAWS OF 1909.**Chapter 62.**

AN ACT in relation to taxation, constituting chapter sixty of the consolidated laws.

Became a law February 17, 1909, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

**CHAPTER 60 OF THE CONSOLIDATED
LAWS.**

TAX LAW.

* * * * *

ARTICLE 9.

CORPORATION TAX.

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§ 182. **FRANCHISE TAX ON CORPORATIONS.** For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint-stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corpora-

Chapter 62, Laws of 1909.

tion invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets do not exceed the liabilities, exclusive of capital stock, or

(2) The average price at which such stock sold during said year did not equal or exceed its par value, or

(3) If no dividend was declared,

Then each dollar of the amount of capital stock employed in this state, determined as hereinbefore provided, shall be taxed at the rate of three-fourths of one mill. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, and

(1) The assets exceed the liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of the capital stock, or

(2) The average price at which such stock sold during said year is equal to or greater than the par value,

Chapter 62, Laws of 1909.

Then the amount of capital stock, determined as hereinbefore provided to be employed in this state, shall be taxed at the rate of one and one-half mills on each dollar of the valuation of the capital stock employed in this state, but such valuation shall not be less than

- (1) The par value of such stock,
- (2) The difference between the assets and liabilities, exclusive of capital stock,
- (3) The average price at which such stock sold during said year.

If such corporation, joint-stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged upon the capital stock

- (1) Upon which no dividend was made or declared, or
- (2) Upon which the dividend or dividends made or declared did not amount to six per centum upon the par value,

Chapter 62, Laws of 1909.

At the rate as hereinbefore provided for the taxation of capital stock upon which no dividend was made or declared, or upon which the dividend or dividends made or declared did not amount to six per centum on the par value.

All corporations not taxable under the preceding paragraphs of this section shall be taxed in an amount not less than would be produced by an assessment of one and one-half mills on each one dollar of the actual value of its capital stock, determined to be employed in this state as hereinbefore provided, or one and one-half mills upon each dollar of such capital stock at the average price at which said stock sold during the said year.

* * * * *

§ 184. ADDITIONAL FRANCHISE TAX ON TRANSPORTATION AND TRANSMISSION CORPORATIONS AND ASSOCIATIONS. Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage express, telegraph, telephone, palace car or sleeping car purposes, and every other transportation corporation not liable to taxation under sections one hundred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within this state, which shall include its gross earnings from its transportation or transmission business originating and terminating

Chapter 62, Laws of 1909.

within this state, but shall not include earnings derived from business of an interstate character.

* * * * *

§ 320 of the laws enumerated in the schedule hereto annexed. That portion specified in the last column is hereby repealed.

§ 321. WHEN TO TAKE EFFECT. This chapter shall take effect immediately.

SCHEDULE OF LAWS REPEALED.

LAWS OF		CHAPTER		SECTION
	*	*	*	*
1896		908		All
	*	*	*	*
1901		558		All
	*	*	*	*
1906		474		All
	*	*	*	*
1907		734		All
	*	*	*	*

**EXTRACTS FROM FIRST REPORT OF THE
RAPID TRANSIT BOARD, CITY OF NEW
YORK, FOR 1900-1901.**

Page 56.

"Prior to this time (1898) the Board had had conferences with persons of influence in railroad transportation within New York, in the hope of interesting them in the rapid transit construction. Such interviews were had with the late Cornelius Vanderbilt, with Chauncey M. Depew, President of the New York Central & Hudson River Railroad Company, and with the late Charles P. Clark, President of the New York, New Haven & Hartford Railroad Company. The Board presented to those gentlemen the advantages which it then believed belonged to the rapid transit plan and which, experience has since demonstrated, did in fact so belong, and urged the value of co-operation with the Board. The Board was, however, unable to convince them. Later, like conferences were had with William C. Whitney and others representing the Metropolitan Street Railway interest, and also with other capitalists representing other large railroad interests. But until the actual letting of the Rapid Transit contract in January 1900, the Board was unable to satisfy any responsible person in control of railroad interests within the City of New York, that they could undertake the Rapid Transit contract with any fair chance of profit."

Page 64. From the Board's appeal to the Legislature in 1899.

"The Board, therefore, ventures to urge that if the Legislature shall determine that it is wise to permit a resort to private capital, the largest meas-

First Report of Rapid Transit Board.

ure of authority and discretion compatible with the public interest shall be entrusted to the Board in order that it may frame such a franchise as will certainly attract sufficient private capital and arouse competition. And the Board deems it of especial importance, if private capital is to be enlisted, that the Board may be authorized, in its discretion, to enter into such a contract with the corporation that shall undertake the work as will exempt it from taxation for some limited period, and will insure it for a period of years at least, against the possibility of legislative or municipal interference."

Page 105. From an address before the New York Chamber of Commerce, October 3, 1901, by ex-Mayor Abram S. Hewitt.

"It was evident to me that underground rapid transit could not be secured by the investment of private capital, but in some way or other, its construction was dependent upon the use of the credit of the City of New York. It was also apparent to me that, if such credit were used, the property must belong to the City. Inasmuch as it would not be safe for the City to undertake the construction itself, the intervention of a contracting company appeared to be indispensable. To secure the City against loss this company must necessarily be required to give a sufficient bond for the completion of the work and be willing to enter into a contract for its continued operation under a rental which would pay the interest upon the bonds issued by the City for the construction and provide a sinking fund sufficient for the payment of the bonds

First Report of Rapid Transit Board.

at, or before maturity. It also seemed to be indispensable that the leasing company should invest in the rolling-stock and in the real estate required for its power houses and other buildings an amount of money sufficiently large to indemnify the City against loss in case the lessees should fail in their undertaking to build and operate the railroad."

Pages 107-109. Also from Mr. Hewitt's address.

"The rental to be paid by the contracting company is sufficient to meet the interest upon the bonds issued and to provide a sinking fund for the payment of the bonds at maturity. The contractors take all risk of the construction and of the paying elements of the enterprise. The capital required is provided at the lowest possible cost and the work being executed by the contractors is also carried on with all the economy which private interest invariably secures. The only concession which is made to the contracting corporation is immunity from taxation during the life of the lease. This is in fact a concession in theory rather than in practice, because, if the work were not constructed, there would be no property to be taxed. The great object aimed at was to secure the early completion of the work, its continued ownership by the City, and its reversion, at the end of fifty years, to the City, free and clear of all encumbrances of every kind and nature whatever. The coming generation can therefore arrange for the operation of the road, either at cost or, if it be continued on a profitable basis of fare, for a reduction of general taxation. * * *

It is by no means certain that the contracting company will, for a considerable time, be able to

First Report of Rapid Transit Board.

realize any profit from the operations of the railroad, although the outlook is now much more favorable than at the time when the contract was made. The estimate of the profit which was to be made by the contractors out of the enterprise was purely conjectural, but it is generally agreed by competent men, familiar with great public works, that the terms of the contract are unusually favorable to the City. One thing is certain, that the Rapid Transit System adopted by the Commission will be fully completed and put in operation without involving any additional taxation whatever, and at the end of fifty years, it will be the absolutely unencumbered property of the City. Compared with other enterprises in other cities, it must be conceded that the arrangement made for the construction of this work is the most favorable that has ever been devised or accomplished."

**EXTRACTS FROM THE REPORT OF THE CHAM-
BER OF COMMERCE OF THE STATE OF
NEW YORK IN 1905, ENTITLED
"RAPID TRANSIT."**

*Page 63. From the report of a Committee of the
Chamber of Commerce appointed February 1,
1894.*

"For the reasons stated above (inadequacy of surface and elevated railroads) effective rapid transit construction must now prove a very costly undertaking, and does not present to capital—which is always more or less timid—sufficient inducements to attract the large sums necessary to insure a complete system of rapid transit development. This is why the Rapid Transit Commission has been unsuccessful in inducing private enterprise to accept any plan that they have recommended in the past two years, nor will they be successful for many years to come, in the opinion of your Committee, unless, in some legitimate way, private enterprise is stimulated.

A corporation organized for the purpose of rapid transit construction could not expect to obtain the necessary capital upon a better basis than 6% interest per annum, while money borrowed upon the credit of the City of New York could be obtained for 3%. Hence, it is evident that the revenue necessary to protect the fixed charges on capital borrowed in the ordinary manner, must be double the amount of that needed to provide for the fixed charges on capital borrowed upon the City's credit. If, therefore, the City should agree to lend its credit to such corporation to the extent of two-thirds of the cost of the completed system, with the view of minimizing the volume of fixed charges, the needed

Report of Chamber of Commerce, 1905.

stimulus referred to above would be presented, and a large margin of safety secured."

Page 119.

"When the bid (for Contract No. 1) was accepted by the City, no provision had been made for the capital necessary to execute the contract. Mr. McDonald's efforts to obtain financial assistance from the surety companies failed. Although the plans had been pronounced feasible, capitalists were timid about investing. This was due, not so much to the magnitude of the sum needed to build the road, as to feelings of uncertainty regarding its earning power, when completed. The scheme was regarded as a colossal experiment."

FILED

JAN 14 1915

JAMES D. MAHER

CLERK

Supreme Court of the United States

The People of the State of New
York ex rel. Interborough Rapid
Transit Company, Plaintiff in
error

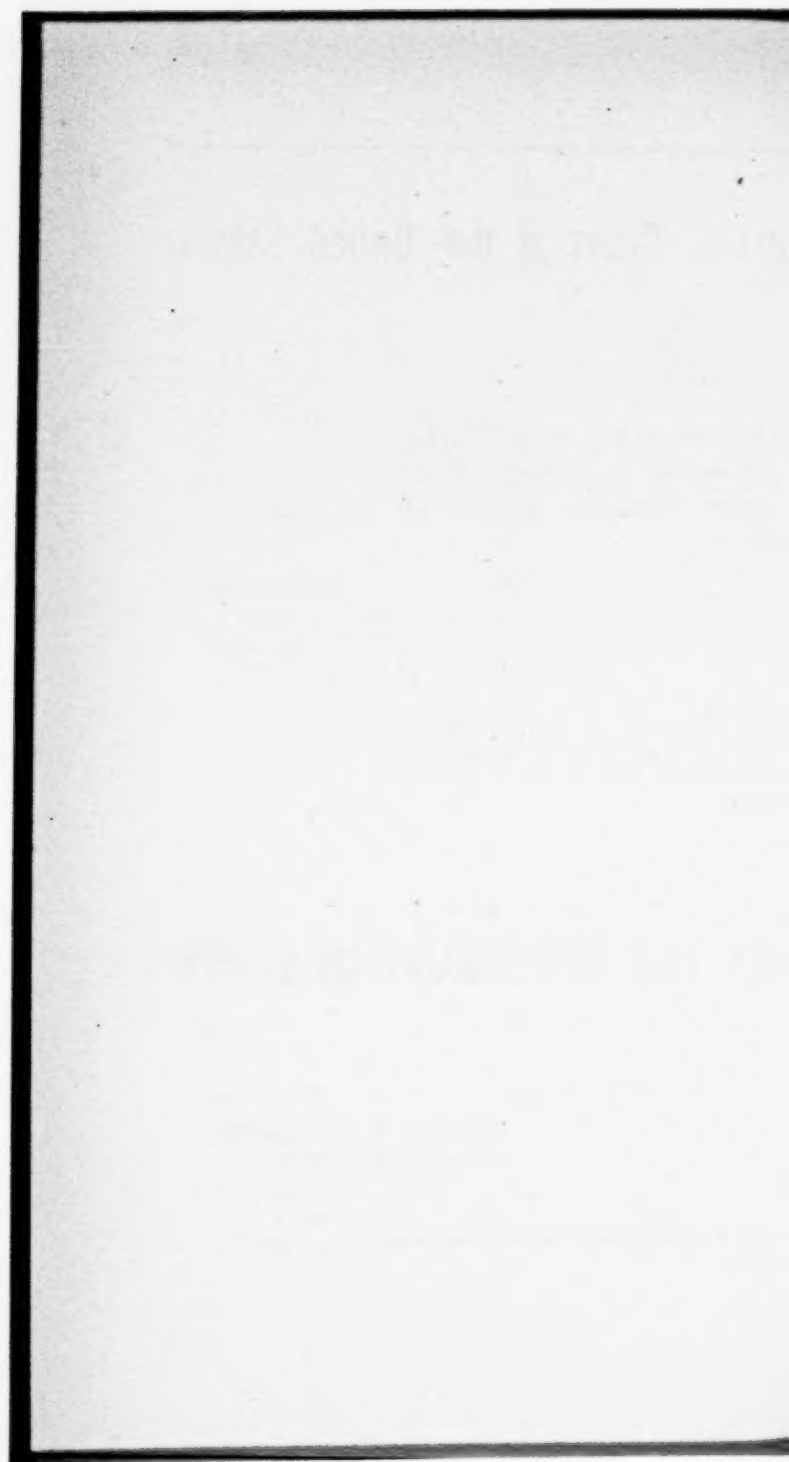
vs.

October Term
1914
No. 129

William Sohmer, as Comptroller of
the State of New York, Defendant
in error

BRIEF FOR DEFENDANT IN ERROR

EGBURT E. WOODBURY,
FRANKLIN KENNEDY,
of Counsel.



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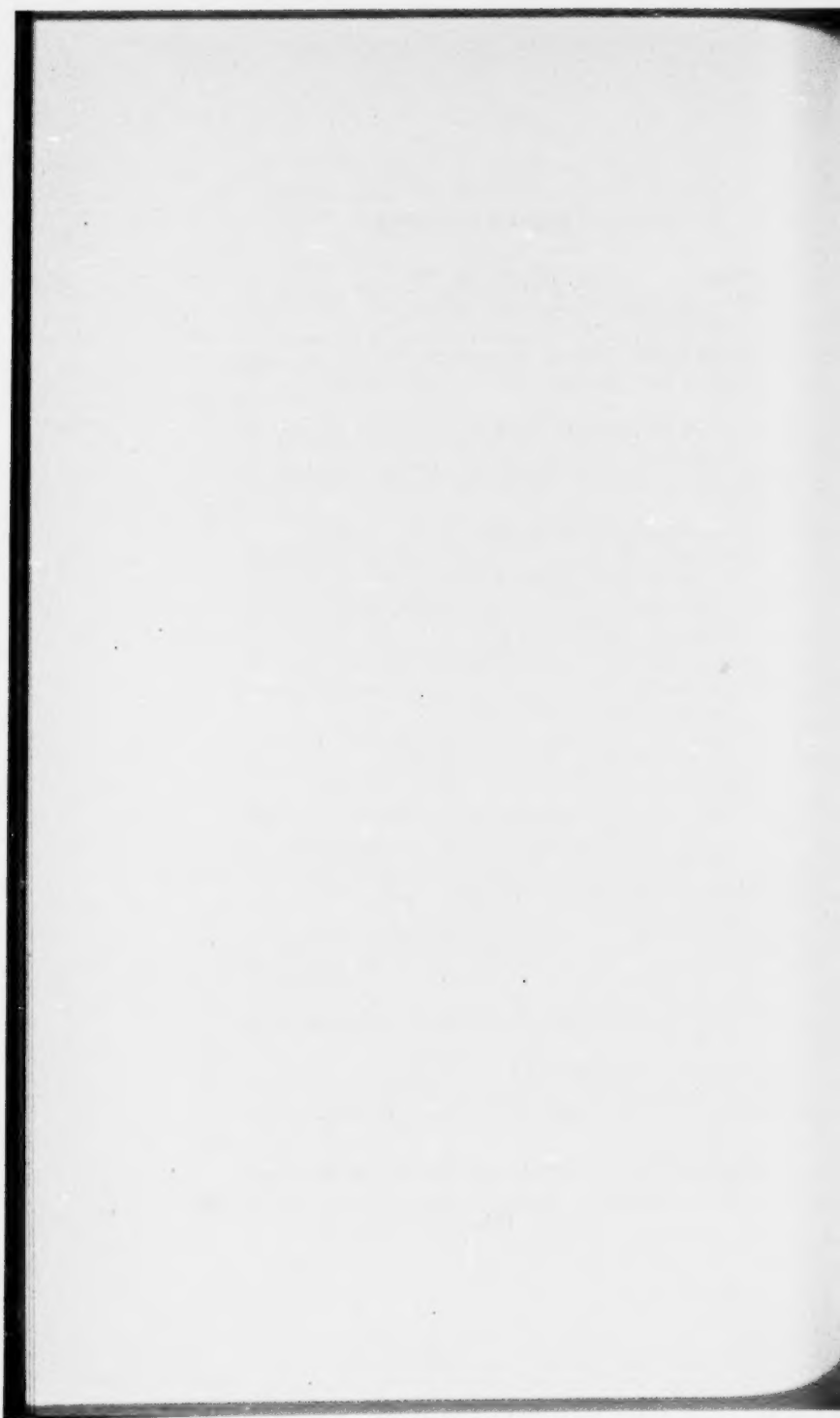
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Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW
YORK ex rel. INTERBOROUGH
RAPID TRANSIT COMPANY,
Plaintiff in Error,
against

WILLIAM SOHMER, as Comptroller
of the State of New York,
Defendant in Error.

October Term,
1914.
No. 129.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK FOR THE DEFENDANT IN ERROR.

STATEMENT.

This proceeding is here on a writ of error to the Supreme Court of the State of New York, to review a final judgment of that court entered on February 27, 1913, which confirmed a determination of the Comptroller of the State of New York, refusing to revise and readjust the amount of corporate franchise taxes imposed by him on the relator, the plaintiff in error, for the years 1907, 1908, 1909 and 1910, under sections 182 and 184 of the Tax Law of the State of New York. (Final judgment of State Court, fols. 170, 171, p. 91; determinations of the State Comptroller, refusing to revise and readjust, fols. 110-114, pp. 60, 61 and 62; petition for writ of error, fols. 4-6, pp. 2, 3; writ of error, fols. 1, 2, p. 1.)

The judgment of the Supreme Court of the State of New York was rendered in a proceeding of

certiorari instituted by the Interborough Rapid Transit Company, the plaintiff in error, to review the aforesaid determinations of the Comptroller of the State of New York, which denied its application for a revision and readjustment of its corporate franchise taxes imposed by the said Comptroller upon the company for the years 1907, 1908, 1909 and 1910, under sections 182 and 184 of the Tax Law of the State of New York. (Petition for writ of certiorari, fols. 30-57, pp. 15-31; order for writ of certiorari, fols. 27, 28, p. 14; writ of certiorari, return to writ of certiorari, fols. 123-126, pp. 67, 68.)

The taxes, as we have observed, which are here involved were assessed by the Comptroller under the provisions of Article IX of the Tax Law of the State of New York, being chapter 62 of the Laws of 1909, entitled "An Act in Relation to Taxation, Constituting Chapter 60 of the Consolidated Laws." The taxes in question were assessed under sections 182 and 184 of that article of the Tax Law, which article provides in section 198 for a revision and readjustment by the Comptroller upon application; and for a review of his determination upon such application by certiorari by the State courts in sections 199 and 200 of the article. It was pursuant to the provisions of sections 199 and 200 of the Tax Law that the defendant in error brought the certiorari proceeding in which the Supreme Court of the State of New York made its final judgment, which is sought to be reviewed here by a writ of error.

The provisions of the Tax Law of the State of New York contained in the aforesaid article, insofar as they are relevant to the questions here

under discussion, are contained in the appendix to the brief of the plaintiff in error at pages 124-142, inclusive.

The taxes, as we have observed, involved in this proceeding, are taxes for the years 1907, 1908, 1909 and 1910. Therefore, the provisions of the Tax Law applicable to their taxation would be the Tax Law as enacted by chapter 474 of the Laws of 1906, as amended. (Pages 130-142 of the appendix to the brief for the plaintiff in error.)

FACTS AND HISTORY OF LITIGATION.

On February 21, 1900, the city of New York, by its board of rapid transit railroad commissioners, entered into a contract with John B. McDonald, pursuant to section 34 of the Rapid Transit Act (chap. 4, Laws of 1891, as amended), for the construction and operation of a subway railroad in the borough of Manhattan. This contract was known as Contract No. 1.

On May 6, 1902, the relator was incorporated under the provisions of the Railroad Law and the so-called Rapid Transit Act, chapter 4, Laws of 1891, as amended (fol. 31, pp. 15, 16 of record).

On July 10, 1902, John B. McDonald assigned "the lease or operating part of Contract No. 1, including the provisions for the equipment of the railroad constructed thereunder" to relator (fol. 32, p. 16).

On July 21, 1902, the city of New York, by the same board entered into a contract with the Rapid Transit Subway Construction Company, for the construction and operation of a subway railroad in the borough of Brooklyn, etc. This was known as Contract No. 2 (fols. 32, 33, pp. 16, 17).

On January 1, 1903, the relator leased the elevated railroads of the Manhattan Railway Company in the boroughs of Manhattan and the Bronx and since April 1, 1903, has continuously operated such elevated railroads (fol. 33, p. 17).

On October 27, 1904, the relator commenced to operate the Manhattan branch of the subways under Contract No. 1, and has continuously operated as lessee since that date (fol. 32, p. 16).

On August 10, 1905, the Rapid Transit Subway Construction Company assigned to relator "the lease or operating part of * * * Contract No. 2, including the provisions for the equipment of the rapid transit railroad constructed thereunder" (fol. 32, pp. 16, 17); and since August, 1905, relator has continuously operated the road constructed under said contract as lessee. (Fol. 32, pp. 16, 17).

Capital.—The authorized capital stock of the relator is \$35,000,000, which is fully paid in (fol. 62, p. 34). None of this capital is employed in the operation of the elevated railroads leased from the Manhattan Railway Company (fol. 33).

Dividends.—Its dividends for the years in question were 9 per cent (except for the year ending October 31, 1906, when it was $8\frac{1}{4}$ per cent), paid quarterly and amounting to \$3,150,000 (fols. 62, 63, pp. 34, 35; fols. 75, 76, pp. 41, 42; fols. 88, 89, p. 48; fols. 102, p. 55). Of this sum the following amounts, according to relator's claim, were net earnings from the subways during the years in question: 1907, \$2,283,111.74 (fol. 64, p. 35); 1908, \$3,050,772.74 (fol. 77, p. 42); 1909, total amount from the subway division (fol. 94, p. 51); 1910, total amount from the subway division (fol. 105, p. 57).

Gross earnings.—The relator has separated the gross earnings of its subway division from the gross earnings of its elevated division. These earnings for the years in question are as follows:

	Elevated.	Subway.	
1907.	\$14,491,682 36	\$8,765,650 65	(Fols. 63, 64, p. 35)
1908.	14,495,873 87	10,783,536 08	(Fols. 76, 77, p. 42)
1909.	14,353,017 21	12,837,018 95	(Fols. 89, 90, pp. 48-49)
1910.	15,108,713 90	14,317,994 83	(Fols. 102, 104-105, pp. 55, 57)

(a) COMPTROLLER'S FIRST DETERMINATION REVIEWED IN 200 N. Y. p. 93.

Section 185 of the Tax Law of the State of New York provides as follows:

“Section 185.—*Franchise tax on elevated railroads or surface railroads not operated by steam.* Every corporation, joint-stock company or association owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the State for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint-stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock.”

Under the provisions of this section the Comptroller imposed a corporate franchise tax on relator measured by all its gross earnings derived

from both its subway and elevated divisions; and by all the dividends declared in excess of 4 per cent whether derived in part or in whole from the operation of its subway division. The amounts of these taxes imposed on the relator for the years in question, under section 185, were as follows: 1907, \$285,073.33 (fol. 68, p. 38); 1908, \$305,294.70 (fol. 82, p. 44); 1909, \$324,100.36 (fol. 95, p. 51); 1910, \$346,767.09 (fol. 109, pp. 59, 60).

The relator in each year protested such tax and applied for its readjustment to the Comptroller: 1907 (fols. 58-61, pp. 32, 33); 1908 (fols. 70-73, pp. 38-41); 1909 (fols. 83-87, pp. 45-47); 1910 (fols. 97-101, pp. 52-55). *The relator conceded so much of the tax as was measured by the gross earnings of its elevated division; but claimed it was erroneous in so far as it imposed a tax on the gross earnings derived from its subway division and on its dividends in excess of 4 per cent. In respect to the operations of its subway division the relator claimed it was exempt from any corporate franchise tax by reason of the provisions of section 35 of the Rapid Transit Act. The Comptroller refused to revise or modify his assessments; thereupon the relator sued out a writ of certiorari to review his determination for the years 1907, 1908 and 1909. The Appellate Division of the Third Department modified this determination of the Comptroller by a divided court of three to two (138 App. Div. 612).*

(b) COURT OF APPEALS DECISION, 200 N. Y. 93.

An appeal was taken to this court both by the Attorney-General and by the relator from this decision of the Appellate Division. This court unanimously reversed the order of the Appellate

Division, Judge Hiscock writing the opinion. This court held: (1) That the relator was not exempt from corporate franchise taxation under the provisions of section 35 of the Rapid Transit Act. Judge Hiscock said upon this point:

" We do not believe that this provision is broad enough to sustain relator's claim and exempt it from the payment of any franchise tax in its subway operation. * * * It seems very clear to us that this exemption covered just what is plainly implied by the natural meaning of the language, namely, the interest acquired and property used under and in carrying out the contracts for the equipment and operation of the road, and it did not extend beyond that.

" Two steps were necessary before the relator could enter upon the equipment and operation of the railroad. The first of these was its creation through incorporation, and the second was the procuring and execution of the contracts for equipment and operation with resulting rights and obligations thereunder. While doubtless the first was taken with express reference to the second the two were entirely separable and distinct and there was no difficulty if the legislature saw fit in exempting relator from taxation ' in respect to * * * its interest under said contract and in respect to the rolling stock and all other equipment of said road ' without exempting it from taxation, because of privileges and exemptions which it enjoyed through corporate existence in securing and carrying out the contracts under which it enjoyed the ' interest ' mentioned, and this is what it did, * * *.

" But, however this may be, and whatever the cause may have been, the language of the statute which actually was passed by the

legislature is not broad enough under any proper rules of interpretation fairly to include the exemption now claimed, and this being so we cannot substitute what would be equivalent to an amendment for judicial construction."

(2) That the relator was not subject to the tax imposed by the Comptroller under section 185 on the gross earnings derived from its subway division. Judge Hiscock said on this subject:

"We do not think that the words 'from all sources,' used in describing the gross receipts made the basis for fixing the amount of the assessment, have a meaning so unqualified and inflexible, under all circumstances as the comptroller and the court below have given them. They should be so interpreted as to carry out what must have been the intention of the legislature. It was doubtless assumed, and ordinarily would be the case, that a corporation operating an elevated road would not be engaged in operating another road of equal or perhaps superior importance, and that whatever other projects it carried on would be of minor importance and incidental to and largely comprehended within the scope of its principal undertakings as the operator of an elevated road. In such a case it would not be at all unreasonable to make it pay a tax for the exercise of its franchise in carrying on its primary and important undertaking which included a percentage on its receipts from these secondary and minor sources which were more or less the results of and dependent on its main enterprise."

(3) That the tax imposed by the Comptroller on the dividends of relator in excess of 4 per

cent was erroneous. Judge Hiscock said on this point:

"But without repeating at length reasons already stated it does not seem to us that because of its operation of an elevated railroad the relator should be assessed for dividends declared upon its capital invested in the subway roads, and it is claimed on this argument that all of its capital is so invested and utilized."

(4) That the relator was subject to the corporate franchise taxes provided by sections 182 and 184 of the Tax Law on account of its subway operations:

"The views which have thus been expressed do not in our judgment lead to the final conclusion that relator, although not assessable in respect to its subway roads under section 185 of the Tax Law, does not come within any of the provisions of the law relating to the assessment of a franchise tax. While that specific question has not been fully discussed on this appeal and therefore, perhaps, should be regarded as subject to further consideration if necessary, we now see no reason to doubt that within sections 182 and 184 are provisions broad enough to provide for a franchise tax against the relator in respect of its equipment, maintenance and operation of the subway roads."

**(c) COMPTROLLER'S SECOND DETERMINATION
UNDER SUCH DECISION.**

In accordance with this decision, the Comptroller made revised determinations (fols. 110-114, pp. 60-62). By this determination the Comptroller taxed relator on the exercise of its corporate franchises: (1) Under section 185, measured

by its gross earnings from its elevated division; (2) under section 182, measured by its capital stock upon which dividends had been declared at the rate of 9 per cent, all of which capital stock was employed in the operation of its subway; (3) under section 184, measured by the gross earnings from its subway division. The total amount of the tax under this revised determination is \$824,874.40, instead of \$914,468.39, the total amount of the tax imposed in his first determination.

The taxes involved in this proceeding for the year ending June 30, 1910, were not involved in the decision of this court set forth above, inasmuch as the proceeding was begun before the tax for that year was imposed. However, all the facts and considerations in reference to the taxes imposed in the preceding years are applicable to such year and it was assessed by the Comptroller in accordance with the above decision (fols. 110, 111, pp. 60, 61).

(d) COURT OF APPEALS DECISION, 207 N. Y., 270 (1913) UPHOLDING COMPTROLLER'S SECOND DETERMINATIONS.

This decision was unanimous and the opinion of the court is to be found in the record at folios 173-176, pages 92-95. This decision was made in a certiorari proceeding similar and under the same authority, as the writ of certiorari sued out to review the first determination. The review of this determination upon such writ of certiorari was heard by the Appellate Division of the Third Department of the State of New York, and that court unanimously confirmed the determinations of the Comptroller. (151 App. Div. 911.)

Thereupon an appeal was taken by the plaintiff in error to the Court of Appeals, which court unanimously affirmed the decision of the Appellate Division.

Mr. Justice Werner, of the Court of Appeals, who wrote the main opinion, said:

“ The questions necessarily decided and involved in the former appeal (200 N. Y., 93) were, therefore, as follows: First. That the relator is not entitled to total exemption from taxation by reason of the provisions of section 35 of the Rapid Transit Act (L. 1894, Chapter 752, sec. 35) for the reasons stated in our former opinion. Second. Under section 185 of the Tax Law, the relator is liable to a franchise tax only upon its elevated road and not upon its subways. Third. Under the provisions of section 183 of the Tax Law, the relator was not entitled to exemption from franchise taxation in respect of its subways, but only in respect of its elevated road, as to which it is taxable under the provisions of section 185 of the Tax Law.

“ In addition to what was actually decided and directly involved on the former appeal, the court expressed the view that the relator, although not taxable in respect to the subways under section 185, is taxable for the right to be a corporation and to exercise its corporate franchise under sections 182 and 184.

“ The matter is now again before us on an appeal from the comptroller's revision of the taxes under all these sections. To the extent of the tax under section 185 relating to the franchises connected with the elevated road, there is now no complaint by either party. As to the amount of taxes levied under sections 182 and 184 there is no question, if there is any right to levy a tax under them, but the relator asserts that, having paid its tax under

section 185, it is wholly exempt from all other franchise taxation.

"We think there is no room for doubt as to the meaning and effect of the sections 182 and 184. These sections are broad enough to authorize the tax which the Comptroller has now levied upon the relator's right to operate the subways as a corporation."

Chief Judge Cullen, of the Court of Appeals, in a separate memorandum, said:

"So far as it is contended that the relator is exempt from taxation with respect to its subway operations, by virtue of section 35 of the Rapid Transit Act, the point is the same as that presented in *People ex rel. Cornell Steamboat Company v. Sohmer* (206 N. Y. 651). The tax is imposed on the relator not for the franchise of operating the subway, but for being a corporation and operating the subway in that capacity instead of as individuals, partners or tenants in common. There is nothing in the section of the Rapid Transit Act cited that gives the person or persons who contract with the municipality the right to be a corporation, and what the relator is now charged for is merely for that privilege."

A final judgment was entered upon this decision in the Supreme Court (page 91 of the Record) and from that final judgment it was brought to this court, as has been observed, by writ of error.

(c) THE PLAINTIFF IN ERROR'S CONTENTIONS IN THIS COURT.

These are contained in the assignment of error filed on its behalf (Record, pp. 9-11), and are restated upon page 13 of its brief in this court. These contentions appear to be three:

First.—That the tax laws of the State of New York under which the taxation was imposed as con-

strued by the courts of the State of New York, impair the obligations of contracts between plaintiff in error and the city of New York, respecting the equipment, maintenance and operation of the rapid transit railways. The alleged contract is based on section 35 of chapter 752 of the Laws of 1894 of the State of New York, entitled "An Act to amend chapter 4 of the Laws of 1891, entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants.'" This section became a law May 22, 1894; and section 35 first appeared in this chapter 752 of the Laws of 1894. This chapter is set forth in the appendix of the brief for the plaintiff in error at pages 35-53, and section 35 is to be found at pages 46 and 47 of such appendix.

Second.—It is claimed that the assessment by the Comptroller of the taxes in question, under the provisions of the Tax Law of the State of New York, impaired the obligation of the contract claimed to be constituted by the aforesaid section 35 of the Rapid Transit Law, exempting the plaintiff in error from taxation.

Third.—That the assessment under the aforesaid provisions of the Tax Law constitutes a taking of property without due process of law, in violation of the Fourteenth Amendment.

These contentions will be taken up in their order in this brief.

(f) SUMMARY.

The court will therefore note that the Comptroller first imposed a corporate franchise tax upon the plaintiff in error for the years in question, under section 185 of the Tax Law of the State

of New York. Therefore, the reports of the plaintiff in error to the Comptroller under the appropriate provisions of the Tax Law for the years in question, the protests made by the plaintiff in error in relation to those taxes, and the applications for revision and readjustment, are all based upon the proposition that the plaintiff in error, both as to its elevated and subway operations, was taxable under section 185 of the Tax Law.

The Comptroller, upon these reports, protests applications for readjustment and revision and upon the testimony and exhibits taken and offered on the hearing had for revision and readjustment (pp. 69-78 of the Record), made his first determination, refusing to revise or readjust the assessments. (First determination, p. 52 of the Record.) This determination, as we have seen, was modified by the Court of Appeals in 200 N. Y., in which that court held that the determination of the Comptroller was correct in taxing the elevated operations of the plaintiff in error under section 185 of the Tax Law, but that it was incorrect in assessing, under that section, the operations of the plaintiff in error in relation to its subway operations, declaring that such provisions were properly taxable under sections 182 and 184 of the Tax Law of the State of New York.

The Comptroller, under that decision, made his second determination (pages 60 to 62 of the Record) in which, following the decision of the Court of Appeals, he taxed the plaintiff in error insofar as its elevated operations were concerned, under section 183, and so far as its subway operations were concerned, under sections 182 and 184 of the Tax Law. These were two separate

determinations, inasmuch as the corporate franchise taxes due during the year 1910 was then included, and its corporate franchise tax for that year assessed. There was no hearing or other proceedings under the appropriate sections of the Tax Law of the State, but the Comptroller, upon the original reports received and the protests and applications for revision and readjustment, and the testimony and proceedings had upon the original hearing for revision and readjustment, assessed the plaintiff in error for the taxes in question pursuant to the decision of the Court of Appeals in 200 N. Y. 93. And, as we have observed, from these two determinations, made under such decision, the relator sued out a new writ of certiorari to review his determinations, and in this proceeding of certiorari the Court of Appeals made the final order and judgment which is here sought to be reviewed by writ of error.

POINTS**I.**

NEITHER THE CONSTRUCTION OF THE AFORESAID TAX LAWS BY THE COURT OF APPEALS NOR THE ASSESSMENT IMPOSED UPON THE PLAINTIFF IN ERROR UNDER THEM, CONSTITUTES AN IMPAIRMENT OF THE OBLIGATION OF A CONTRACT UNDER ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

(a) NO FEDERAL QUESTION IS INVOLVED, BECAUSE THERE WAS NO LAW INVOLVED SUBSEQUENTLY PASSED IMPAIRING THE OBLIGATION OF CONTRACTS UNDER THE CONSTITUTIONAL PROVISION.

The constitutional provision reads as follows:

“ No state shall * * * pass any * * * law impairing the obligation of contracts.”

It is well established by authority that this constitutional provision is not a general prohibition against “ *any law* impairing the obligation of contracts.”

The mere fact that something has happened to impair the obligation of a contract does not, of itself, raise any Federal question. The impairment must take place by the terms or necessary effect of some solemn act of the State operating with legislative force. To raise a Federal question there must be some act of legislation or of the highest judicial construction having the force of law. Where the decision of the court of last resort does not give effect to some *subsequent* statute, constitution or ordinance, but merely decides on independent grounds against the right claimed under a contract, such decision is not a law impairing contractual obligation. It is only

where the judgment of a court of last resort of a State construes and gives effect to some subsequent statute, constitution or ordinance having the force of law, and by that construction impairs the obligation of a contract, valid by the law in force when it is made, that such a judgment is a law impairing the obligation of a contract.

Gray on Limitations of Taxing Power and Public Indebtedness, pp. 487, 488.

New Orleans Water Works Company v. Louisiana Sugar Refining Company, 125 U. S. 18, at p. 38 (1887).

Interurban Railway Company v. Olathe, 222 U. S. 187, at p. 190 (1911).

Cross Lake Club v. Louisiana, 224 U. S. 632, at p. 638, 639 (1911).

Bacon v. Texas, 163 U. S. 207, at p. 216 (1895).

In its latest expression of this principle, this court said in *Cross Lake Club v. Louisiana*, at page 638:

“With this statement of the case we come to consider whether it presents any question under that clause of the Constitution which declares, ‘No state shall * * * pass any * * * law impairing the obligation of contracts.’ This clause, as its terms disclose, is not directed against all impairments of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court

when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a Federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired. (*Knox v. Exchange Bank*, 12 Wall. 379, 383; *Central Land Co. v. Laidley*, 159 U. S. 103, 111-112; *Bacon v. Texas*, 163 U. S. 207, 220-221; *Turner v. Wilkes Co.*, 173 U. S. 461; *National Building & Loan Assn. v. Brahan*, 193 U. S., 635, 647; *Hubert v. New Orleans*, 215 U. S., 170, 175; *Fisher v. New Orleans*, 218 U. S., 438; *Interurban Railway Co. v. Olathe*, 222 U. S., 187.)"

In the case at bar it is clear that, after May 22, 1894, when section 35 was first enacted, in chapter 752 of the Laws of 1894, there was no *subsequent* exertion of the legislative power of the State with reference to such section. There is no claim, and, indeed, the specifications of error

as stated in the brief of plaintiff in error on page 13 makes no claim that there was. It is simply claimed there that the construction of the Tax Laws of the State of New York by the Court of Appeals and the assessment of corporate franchise taxes involved under the Tax Law of the State impaired the obligation of the contract.

When section 35 was passed corporate franchise taxation was in full force and effect and had been since chapter 542 of the Laws of 1880 had been. Sections 182 and 184 had been substantially in force since 1880. The provisions of sections 182 and 184, as they are found in the Tax Law today, and as they were in force when section 35 was passed, were substantially the same as they were prior to the enactment of section 35 in 1894.

The history of sections 182 and 184 of the Tax Law will be found below in a note.

HISTORY OF SECTIONS 182 AND 184: Corporate franchise taxation was inaugurated in the State of New York by Chapter 542 of the Laws of 1880. By section 3 of that act all corporations, with certain exceptions, were subjected to a corporate franchise tax based on capital stock. This is now section 182 of the Tax Law.

The original statute of 1880 relating to sections 182 and 184 may be found in schedule A attached to this brief.

By section 6 of that act it was provided, "*In addition to the tax above provided for, Every corporation formed for railroad * * * or transportation purposes, and every elevated railroad, and every other corporation * * * doing business in this State, and owning, operating or leasing to or from another corporation, * * * any railroad * * * route or line * * * shall pay to the State Treasurer * * * a tax of five-tenths of one per cent upon the gross earnings in this State of said corporation or company * * *. Nothing in this section shall be held to apply to any street surface company.*"

This act of 1880 was amended the next year by chapter 361 of the Laws of 1881; the aforesaid section 6 was not amended in any respect affecting the questions involved here, except that the last sentence excepting street surface railways from the gross earnings tax was removed.

In 1896 the Tax Law was revised (chapter 908, Laws of 1896); section 3 of the original act of 1880 became section 182 of the

It will be seen from this history that since 1880 the provisions of the Corporate Franchise Tax Law of this State have not been changed with reference to the corporate franchise taxation of corporations earning or declaring more than 6 per cent. dividends, and it is under these provisions of section 182 that the plaintiff in error here is taxed, inasmuch as for the years in question it declared 9 per cent. dividends. It will be further observed that since 1880 the provisions of section 184 have not been changed in any substantial particular, but were substantially the same in 1880 as they were in 1894, when section 35 was enacted and as they are today.

It was under these provisions which existed at the time that section 35 of the Rapid Transit Law was enacted that the Comptroller, from 1907 to 1910, taxed the plaintiff in error upon the exercise of its corporate franchises, under sections 182 and 184 of the Tax Law. Subsequent to the enactment of section 35 of the Rapid Transit Law, no statute was passed which substantially changed the taxing provisions under which the plaintiff in error was taxed, and the only claim which, as we have observed, the plaintiff in error here makes is that the impairment of obligation arose from the construction of the Court of Appeals of these statutes and in the assessment by the

Tax Law. The exemptions contained in paragraph 3 became section 183; paragraph 6 became section 184, and an entirely new section, section 185, was enacted.

Since 1896 section 182 was amended by chapter 369 of the Laws of 1897, chapter 448 of the Laws of 1901, chapter 474 of the Laws of 1906, chapter 474 of the Laws of 1907, but in no particular that substantially affects the question herein involved.

Since 1896 section 184 was amended by chapter 734 of the Laws of 1907, but in no particular which substantially affects the questions herein involved.

Comptroller of these taxes under the aforesaid taxing provisions.

It is true that the plaintiff in error, in Point VI of his brief, claims that the construction given by the State courts of New York were of statutes enacted subsequently to the act of the Legislature authorizing the exemption and statutes enacted subsequently to the making of the contracts for the railroads. However, the history of the statutes under which the assessments were made shows that the provisions of sections 182 and 184, under which the assessment was made by the Comptroller, were enacted in 1880 and have continued in force, as thus enacted, down to the present time.

Chapter 908 of the Laws of 1896 did not work any change in these provisions, but was simply a revision of the existing law. Chapter 558 of the Laws of 1901 did not change these provisions. Chapter 474 of the Laws of 1906 did not change these provisions, nor did chapter 734 of the Laws of 1907. Chapter 62 of the Laws of 1909 was simply a consolidation of the existing Tax Law and did not in any way modify or change the provisions in relation to corporate franchise taxation in question.

Therefore, it is submitted, under the well-established provisions of law set forth above, that, inasmuch as the decision of the Court of Appeals did not give effect to any *subsequent* statute, constitution or ordinance, but merely decided on independent grounds against a claim of exemption from taxation under a State statute, its decision is not a law impairing the contractual obligation, nor was the assessment by the State Comptroller.

(b) ASSUMING THAT THERE IS A FEDERAL QUESTION ARISING UNDER THE CONSTITUTIONAL PROVISION AS TO THE IMPAIRMENT OF CONTRACTS, YET SECTION 35 DOES NOT CONSTITUTE A CONTRACT.

It is well established that the vital elements of a contract, within the constitutional sense, are mutual assent and consideration. Whenever these two elements meet there is a contract which the Constitution will protect.

Wisconsin & Michigan Railway Co. v. Powers, 191 U. S. 379, at pp. 386, 387.

Mr. Justice Holmes said in that case:

“ In the case at bar, of course the building and operation of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, *Martin v. Meles*, 179 Massachusetts, 114, 117, it is clear that we should require an adequate expression of an actual intent on the part of the State to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, Shreveport*

& *Pacific Railroad v. Dennis*, 116 U. S., 665, 668. Looking at the case in this way, then, we find no such adequate consideration. No doubt the State expected to encourage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain. See *Covington v. Kentucky*, 173 U. S., 231, 238, 239."

See, also, Gray on Limitations of Taxing Power, p. 512.

In the case at bar no exemption was given in the charter or certificate of incorporation. The exemption claimed is the provision of a general statute passed in 1894. It was a general provision, open to any one in the world who desired to enter into a contract for constructing, maintaining, equipping and operating an underground railroad. It was not addressed particularly to John B. McDonald or the Rapid Transit Subway Construction Company, who procured the contracts and who assigned them subsequently to the plaintiff in error.

Further, in the case of *Salt Company v. Saginaw*, 13 Wall, 373, where in Michigan the Legislature enacted a law to encourage the making of salt by giving an exemption from taxation upon all property used in salt making, the court held that this was not an irrepealable contract. It held that the exemption was a mere bounty repealable at the will of the State. The exemption was distinguished from an exemption granted by express charter by the fact that the law applied to all persons and corporations who should engage in the business specified. The court said:

"There is no obligation on the part of any person to comply with the conditions of the

law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue or not to continue the law."

In this connection it will be remembered that the Legislature, by chapter 599 of the Laws of 1905, abolished the exemption provided in section 35, but in the repealing statute expressly saved the exemption accorded to railroads prior thereto. So that the relator has its exemption, not by reason of any theory of irrepealable contract between itself and the State, but through an express provision of the Legislature which expressly continued the exemption, so far as plaintiff in error was concerned, but abolished it for the future.

It would, therefore, appear that the principle stated in the *Wisconsin and Michigan Railway Case, supra*, was controlling, and that, therefore, no contract arose under the provisions of section 35 of the Rapid Transit Act.

(c) THE ASSIGNMENTS TO THE PLAINTIFF IN ERROR OF CONTRACTS 1 AND 2 BY MACDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY DID NOT CARRY WITH THEM THE EXEMPTION WHICH THE ASSIGNORS OBTAINED UNDER SECTION THIRTY-FIVE.

It is well established that the right of exemption or immunity from taxation which may be gained by contract is a right which, unless otherwise expressly provided, pertains strictly to the persons or corporations to which it is originally granted; and does not pass to assignees or successors, except by express statutory direction or absolutely necessary implication. This results from the principle that exemptions are strictly construed and never sustained unless given in language and

unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question are resolved in favor of the public.

Covington & Lexington Turnpike Co.
v. *Sandford*, 164 U. S. 578.

Norfolk & Western R. R. Co. v. *Pendleton*, 156 U. S. 667-673.

Chesapeake & Ohio R. R. Co. v. *Miller*,
114 U. S. 176.

Morgan v. Louisiana, 93 U. S. 217.

(d) ASSUMING THAT THERE WAS A CONTRACT UNDER THE CONSTITUTIONAL PROVISION, YET THIS COURT, WHILE IT WOULD HAVE THE POWER TO DETERMINE INDEPENDENTLY, BY ITS OWN INTERPRETATION AND CONSTRUCTION OF THE SECTION, WHETHER THERE WAS AN IMPAIRMENT OF OBLIGATION, YET, UNLESS IT IS VERY CLEAR, IT WILL FOLLOW THE CONSTRUCTION GIVEN TO THE STATUTE BY THE STATE COURTS.

New Orleans v. Stempel, 175 U. S. 309
(1899), at p. 316.

This court said in that case, at page 316:

“ When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the state, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the state. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property within the state from its liability to state taxation unless it is obvious that the statutes of the state warrant such exemption, or unless the mandates of the Federal Constitution compel it.”

The courts of New York have construed section 35 as not exempting the plaintiff in error from corporate franchise taxation under sections 182 and 184 of the Tax Law. The question of its construction was first presented to the Court of Appeals on the first determination of the Comptroller in 200 N. Y. 92. In that proceeding the question was squarely up for determination upon the contention of the plaintiff in error that it was exempt from corporate franchise taxation, and the court squarely determined that it was not.

Mr. Justice Hiscock of that court, in his opinion, excerpt from which has been given above, said that section 35 was not broad enough "to sustain relator's claim and exempt it from the payment of any franchise tax in its subway operation."

He further said:

"It seems very plain to us that this exemption covered just what it plainly implied by the natural meaning of the language, namely, the interest acquired and property used under and in carrying out the contracts for the equipment and operation of the road, and it did not extend beyond that."

Again, the relator, on a review of the second determination of the Comptroller, raised the same question, and the Court of Appeals again, in 207 N. Y., reiterated its decision upon the first determination.

Mr. Justice Werner said:

"The questions necessarily decided involved in the former appeal (200 N. Y., 93) were therefore as follows:

"First. That the relator is not entitled to a total exemption from taxation by reason of the provisions of section 35 of the Rapid Tran-

sit Act (Laws 1894, Chapter 752, sec. 35) for the reasons stated in our former opinion.

"Second. Under section 185 of the Tax Law, the relator is liable to a franchise tax only upon its elevated road, and not upon its subways.

"Third. Under the provisions of section 182 of the Tax Law the relator was not entitled to exemption from franchise taxation in respect of its subways, but only in respect of its elevated road, as to which it is taxable under the provisions of section 185 of the Tax Law.

"In addition to what was actually decided and directly involved on the former appeal, the court expressed the view that the relator, although not taxable in respect of the subways under section 185 is taxable for the right to be a corporation and to exercise its corporate franchises under sections 182 and 184." (Folios 93 and 94 of the Record.)

And Mr. Justice Cullen, chief judge of the court, in his concurring memorandum, said:

"So far as it is contended that the relator is exempt from taxation with respect to its subway operations, by virtue of section 35 of the Rapid Transit Act, the point is the same as that presented in *People ex rel. Cornell Steamboat Company v. Sokmer*, (206 N. Y., 651) (unanimously affirmed by this Court, by a decision handed down at this term) the tax is imposed on the relator, not for the franchise of operating the subway, but for being a corporation and operating the subway in that capacity, instead of as individuals, partners or tenants in common. There is nothing in the section of the Rapid Transit Act cited that gives the person or persons who contracted with the municipality the right to be a corporation, and what the relator is now charged for is merely for that privilege."

It is submitted that a construction of a statute of exemption from taxation by a State court, so conclusively and unanimously determined, will not be disturbed by this court unless it is clear beyond peradventure that the State court was in error in its construction.

As we have before observed, the Court of Appeals was not here construing statutes passed subsequently to the passage of section 35 of the Rapid Transit Act, but was construing State statutes which were in existence and in force at the time the exempting statute was passed and had been in force many years prior thereto. In such situation it is submitted that the decision of the State court construing the provisions of section 35 is conclusive upon this court, or, if not conclusive, and this court asserts its right to construe independently the provisions of the section in question, under the constitutional provision, then it will follow the construction put upon it by the State court where such construction is so conclusive and without doubt.

(d) ASSUMING THAT THIS COURT HAS THE RIGHT TO CONSTRUE, INDEPENDENTLY OF THE DECISION OF THE STATE COURT, SECTION 35, YET IT MUST CONSTRUE IT AS NOT EXEMPTING PLAINTIFF IN ERROR FROM CORPORATE FRANCHISE TAXATION UNDER THE TAX LAW OF THE STATE OF NEW YORK.

(1) Nature of the tax imposed under sections 182 and 184.

The nature of the tax is defined in the sections themselves. Section 182, entitled "Franchise tax on corporations," states, "For the privilege of doing business or exercising its corporate franchises in this state, every corporation * * * doing business in this state shall pay to the state

treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock," etc.

Section 183 contains exemptions from the tax levied by section 182; and then follows section 184, which is entitled "Additional franchise tax on transportation and transmission companies and associations." This section imposes a tax on every corporation not liable to taxation under sections 185 and 186 of the Tax Law, "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State."

The Court of Appeals, in

People ex rel. Cornell Steamboat Company v. Sohmer, as Comptroller
(206 N. Y. 651),

where there was a claim that sections 182 and 184 of the Tax Law interfered with interstate commerce, said through Mr. Justice Cullen, presiding judge:

"I vote for the affirmance of the order appealed from on the strength of the proposition asserted in the dissenting opinion in *New York Terminal Company v. Gaus*, (204 N. Y. 512, 519) that the franchise tax imposed by the statute (section 182) is levied on the corporation for the privilege, as the statute states, of carrying on its business in a corporate or organized capacity; *not of doing business, but of doing business in a corporate capacity*; in other words, exclusively for the privilege of being a corporation, instead of a partnership, and the additional franchise tax required by section 184 is, in my opinion, exactly of the same character." (Italics ours.)

This case was taken to this court by a writ of error, and the decision of the Court of Appeals was unanimously affirmed by this court at its present term.

The distinctive character of this tax levied on the exercise of a corporate franchise imposed by sections 182 and 184 of the Tax Law of the State of New York has been very clearly pointed out by this court in the case of

People v. Home Insurance Company,
92 N. Y. 328, affirmed, 134 U. S. 594.

This case involved the constitutionality of these very statutes of the State of New York imposing corporate franchise taxation. The original statute from which sections 182 and 184 were derived was involved; that is, the statute of 1880. Under their provisions the State of New York attempted to measure its corporate franchise tax under section 182, in part, by United States bonds. This court, upholding the constitutionality of the tax, said:

“By the term ‘corporate franchise or business,’ as here used, we understand is meant * * * the right or privilege given by the state to two or more persons of being a corporation; that is, of doing business in a corporate capacity. * * * The granting of such right or privilege rests entirely in the discretion of the state, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise and also its continued exercise, that the corporation pay a specific sum to the State each year or month, or a specific portion of its gross receipts, or of the profits of its

business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem best to adopt in fixing the amount for any year which it will exact for the franchise."

Also see

People ex rel. U. S. A. P. P. Co. v. Knight, 174 N. Y. 475.

Maine v. Grand Trunk Railroad, 142 U. S. 217.

Therefore, this is a tax not upon property or upon dividends, or upon capital stock, or upon gross earnings, but is a tax imposed upon the privilege of being a corporate entity, for the privilege of exercising corporate franchises; which in this case are those of a domestic corporation, granted by the State of New York itself, and the dividends, the gross earnings and the capital stock are only used as a convenient measure for the purpose of valuing each year the exercise of those corporate franchises granted by the State.

So it has been held that a State may measure corporate franchise taxation by interstate commerce.

United States Express Company v. Minnesota, 223 U. S. 535 (1911).

Maine v. Grand Trunk Railroad Co., 142 U. S. 217.

People ex rel. Pennsylvania Railroad Co., 138 N. Y. 1.

The counsel for plaintiff in error seems to be somewhat confused about the nature of the tax imposed by sections 182 and 184. For instance, he claims that Chief Judge Cullen fell into error

in what the counsel for the plaintiff in error calls his dissenting opinion in *People ex rel. Cornell Steamboat Company v. Sohmer*, 206 N. Y. 651, when he said that the tax under sections 182 and 184 was "exclusively for the privilege of being a corporation instead of a partnership." It should be noted that in the first place, Judge Cullen's opinion is not a dissenting opinion, because he concurred in the decision of the Court of Appeals, which in that case was unanimous. His opinion was simply a concurring memorandum, stating his reasons for concurring in the opinion of the court (pages 22, 23 of brief of plaintiff in error).

Statements at other places in his brief disclose that counsel for plaintiff in error has the impression that it is necessary for a domestic corporation to employ its capital in the State of New York before it could be taxed under sections 182 and 184. This is erroneous, as a consideration of the provisions of section 182 and section 184 will demonstrate.

It must be remembered that section 182 imposes a tax not only upon domestic corporations but also upon foreign corporations. So far as it taxes domestic corporations, the nature of the tax has been repeatedly declared by our courts. It is a tax which the State exacts for the privilege it grants, of acting in a corporate capacity. Dividends and capital stock are simply convenient measures which the State adopts in imposing such taxes.

In regard to foreign corporations, their franchises cannot be made the basis of the tax, inasmuch as this State did not grant them. They are

taxed not for the exercise of their corporate franchises, but for the privilege of doing business within the jurisdiction of this State. As was said in

People v. Equitable Trust Co., 96 N. Y. 387:

"So far as section 3 (now 182) imposes a tax upon corporate franchises, its operation must therefore be confined to corporations created under our laws; *as to foreign corporations the tax is imposed solely upon business.*"

The phrase, therefore, added to the section by the 1906 statute is easily explicable. "*For the privilege of doing business,*" refers to foreign corporations. "*Exercising its corporate franchises,*" refers to domestic corporations.

Also see

People ex rel. American Contracting & Dredging Co. v. Wemple, 129 N. Y. 558.

(2) *The nature of a corporate franchise.*

It is important to keep in mind, in the consideration of the questions involved herein, the essential and fundamental distinction between a corporate franchise and a special or secondary franchise. The corporate franchise of a corporation is, of course, the franchise which gives it corporate entity and is a privilege accorded by the State, revocable at pleasure. The special franchises of a railway company, on the other hand, are the franchises which permit it to operate through public streets or highways, and in the case of the plaintiff in error would be the franchises to operate in the city of New York

an underground railway under the public streets and highways. A railroad's special or secondary franchises are property, and they are protected under the Constitution of the State of New York and the Constitution of the United States. That special or secondary franchises of street railways are property which cannot be revoked by the Legislature without compensation was determined in the State of New York in the case of

People v. O'Brien, 111 N. Y. 1.

The radical distinction between special franchises and corporate franchises is well pointed out in the cases of the

City of New York v. Bryan et al., 196 N. Y. 158, at p. 165.

Lord v. Equitable Life Insurance Association, 194 N. Y. 212, at p. 226.

Corporate franchises have none of the incidents of property. They are inalienable, not assignable and not mortgageable; neither do they survive dissolution. It is wholly within the power of the Legislature to revoke them at any time without compensation.

People v. O'Brien, 111 N. Y. 1, at p. 48.

As was said by this court in the *Home Insurance Company v. New York*, 134 U. S. 601:

“The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York or of other states. From the very nature of the tax being laid upon a franchise given by the State, it cannot be affected in any way by the character of the property

in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised is as ample and plenary in the one case as in the other."

This distinction between corporate and special or secondary franchises is particularly important because of the many cases which may be found in the books, some of which appear in the brief of the plaintiff in error in this case, which confuse corporate and special franchises.

The cases of *Wilmington R. R. Co. v. Reed*, 13 Wall. 264, and *Pacific R. R. Co. v. Maguire*, 87 U. S. 36, cited on page 25 of the brief of plaintiff in error, and the case of *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, to be found cited on page 26 of the brief of plaintiff in error, are cases that are concerned *not* with corporate franchises but with special franchises; that is, with franchises that constitute a vested property interest, and not a mere privilege, revocable at the pleasure of the Legislature.

(3) *The provisions of section 35 of the Rapid Transit Act of New York do not exempt the plaintiff in error from corporate franchise taxation.*

The principles of construction governing the construction of the provisions of statutes giving exemptions from taxation are familiar.

In *Vicksburg, etc., Railroad Co. v. Dennis*, 116 U. S. 665, at page 668, the court said:

"In *Philadelphia & Wilmington Railroad v. Maryland*, 10 How. 376, Chief Justice Taney said: 'This court on several occasions has held that the taxing power of a State is never presumed to be relinquished unless the

intention to relinquish is declared in clear and unambiguous terms.' 10, How. 393.

In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that 'neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered unless such surrender is expressed in terms too plain to be mistaken;' that exemption from taxation 'should never be assumed unless the language used is too clear to admit of doubt;' that 'nothing can be taken against the State by presumption or inference; the surrender, when plain, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the State;' that a State 'cannot by ambiguous language be deprived of this highest attribute of sovereignty;' that any contract of exemption 'is to be rigidly scrutinized, and never permitted to extend either in scope or duration, beyond what the terms of the concession clearly require;' and that such exemptions are regarded 'as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grants, construed *strictissimi juris*.'

Therefore, with this principle of construction in mind, and considering the nature of the corporate franchise taxation imposed in sections 182 and 184 of the Tax Law of the State of New York, and the nature of a corporate franchise, let us inquire whether the provisions of section 35 exempt plaintiff in error from corporate franchise taxation under such sections.

Section 35 of the Rapid Transit Act, when first enacted (Laws of 1894, chap. 752), provided as follows:

“Section 35: The person, firm or corporation operating such road, shall be exempt from taxation in respect to his, their or its interest therein under said contract and in respect to the rolling stock and other equipment of said road, but this exemption shall not extend to any real property which may be owned and employed by said person, firm or corporation in connection with the construction or operation of said road.”

In 1900 by chapter 616, it was amended by the following sentence superimposed on the provisions quoted above:

“Section 35. The equipment to be supplied by the person, firm or corporation operating any such road shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power-houses, and all apparatus and all devices for signaling and ventilation.”

By chapter 599 of the Laws of 1905, the Legislature, changing its policy, abolished the exemption from taxation theretofore given in section 35 to railroads built under the Rapid Transit Act; however, the exemption theretofore granted to railroads built under such act was preserved.

What is exempted from taxation by section 35 is clearly set forth in the provisions of such section: (a) The interest acquired under the contract of construction and operation; (b) rolling

stock and all other equipment. What is intended by rolling stock is obvious. The equipment is very specifically set forth by the amendment of 1900. What was intended by the "interest under said contract" is clearly gathered from other sections of the Rapid Transit Act and particularly from section 34 of such act.

Section 34 provided that the board of rapid transit commissioners shall after certain preliminaries "enter into a contract with any person, firm or corporation which in the opinion of said Board shall be best qualified to fulfill and carry out said contract for the construction of said road or roads upon the routes, and in accordance with the plans and specifications so adopted." It also provided:

"Every such contract (contract for construction) shall also provide that the *person, firm or corporation* so contracting to construct said road or roads shall, at his, or its own cost and expense, equip, maintain and operate said road or roads for a term of years to be specified in said contract, not less than thirty-five nor more than fifty years, and upon such terms and conditions * * * as said board shall deem to be best suited to the public interests, etc." [Italics ours.]

Contract No. 1, entered into with John B. McDonald, and Contract No. 2, entered into with the Rapid Transit Subway Construction Company, were contracts entered into in accordance with the provisions of section 34 and they were contracts *both for construction and for equipment and operation*. The relator herein procured only an assignment of the lease or operating part of both contracts and the contract for equipment

(fols. 16, 18). It is clear that the interest which relator secured by assignment in both contracts for operation and equipment, was the right of operation of the railroads specified in the contract under the conditions contained therein, in accordance with the provisions of section 34. It is absurd for the plaintiff in error to claim that its interest in Contract No. 1, which it obtained by assignment on July 10, 1902, included exemption from taxation on its corporate franchises which were obtained from the sovereign, the State of New York on May 6, 1902, *almost two years after Contract No. 1 was entered into by John B. McDonald*. The incorporation of the defendant and the procurement of the assignments of the operating and equipment parts of both contracts were as Judge Hiscock said in his opinion on page 99, "entirely separable and distinct."

Further, the contractor for construction and operation of the proposed subways was not required by section 34 or any other provision of the Rapid Transit Act to be a corporation as is stated in brief of counsel for plaintiff in error. It is expressly specified that the rapid transit commissioners could enter into a contract for operation and construction with a "*person, firm or corporation*" and section 35 expressly provides that such "*person, firm or corporation*" is entitled to exemption. *As a matter of fact, Contract No. 1 was made with an individual, John B. McDonald*. The relator in its petition, at folio 50, p. 27, says that, inasmuch as the original contractor under Contract No. 1 would not be subject to a corporate franchise tax, that, therefore, the relator is not liable to such taxation. It is asserted at page 27,

folio 50, " that petitioner as operator of the subway is not subject to assessment for or liable to pay taxes upon any property or rights which would have been exempted if said McDonald were now operating instead of relator." In that claim is contained the fundamental error of relator's argument. John B. McDonald would not be subject to a corporate franchise tax for the obvious reason that he is a natural person, entitled by his legal status as a natural person under the Constitution to enter into a legal contract; in order to enter into Contract No. 1 he had no need to acquire from the State of New York any rights or privileges of legal status in addition to those he had as a natural person. But the relator had such need; it had to procure from the State the right to be a corporation, which meant a grant of corporate franchises requisite for acting in a corporate capacity. Its legal status, therefore, had to be acquired before it procured an assignment of the contracts in question. It must be clear that the legal status of a party to a contract is no part of the subject-matter of that contract. The relator does stand in the shoes of Mr. McDonald so far as his interest in Contract No. 1 is concerned, but it does not stand in the same position so far as its legal status is concerned. The privilege of being a corporation, granted to the relator by the State, can be no part of Contract No. 1 which Mr. McDonald entered into as an individual. It is upon this privilege or franchise of acting in a corporate capacity that a tax is imposed on relator under sections 182 and 184. As was said by the Supreme Court of the United States in *Home Insur-*

ance Co. v. New York, 134 U. S. 594, 599, when construing the section which is the source of our present section 182:

“The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy.”

It is clear, therefore, that the relator's interest under said contract did not include the corporate franchises which it procured from the State on May 6, 1902, almost two years after Contract No. 1 was entered into.

Further, it is the claim of the relator that the provisions of section 35 were intended to cover all the property of the contractor or his assignee and that corporate franchises are included within such property. The authorities which relator cites are supposed to uphold this proposition. This claim of the relator's is refuted by two considerations: the first is that if the provisions of section 35 were so all-comprehensive as originally enacted by chapter 752, Laws of 1894, *why was it necessary, by chapter 616 of the Laws of 1900, to define more clearly by amendment what property was*

included within the term "equipment." If it were necessary to define more definitely what was covered by the term "equipment" it cannot be successfully claimed that the other provisions of section 35 covered exemption from corporate franchise taxation.

In this connection, it will be remembered that the corporate life of the plaintiff in error is perpetual, as appears from its certificate of incorporation (page 72 of the Record).

(f). A TAX ON CORPORATE FRANCHISES MAY BE MEASURED BY PROPERTY EXEMPT FROM TAXATION.

This is a proposition not open to question at this time. It was raised under the original act for corporate franchise taxation in 1880 where a corporate franchise tax was assessed on the Home Insurance Company, measured by a portion of its capital stock *invested in bonds of the United States*. The court held the tax constitutional and said, at page 606:

"In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is *not a tax on the capital stock or property of the company, but upon its corporate franchise*, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

And so it has been held that a corporate franchise tax under section 182 may be measured by capital stock invested in patent rights, copyrights, United States bonds (138 N. Y. 543, 174 N. Y. 475) and interstate commerce. *Maine v. Grand Trunk*, 142 U. S. 217.

(g) BECAUSE RELATOR IS SUBJECT TO A CORPORATE FRANCHISE TAX UNDER SECTION 185 ON ACCOUNT OF ITS OPERATION OF ELEVATED RAILROADS, IT IS NOT EXEMPT FROM TAXATION UNDER SECTIONS 182 AND 184 ON ACCOUNT OF ITS OPERATION OF SUBWAY RAILROADS UNDER THE PROVISIONS OF SECTIONS 183 AND 184.

A comprehensive system of corporate franchise taxation of all corporations is provided in article 9 of the Tax Law, sections 182 to 194.

Section 182 provides a corporate franchise tax for all corporations, whether domestic or foreign, as follows:

“ For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint stock company or association doing business in this state shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock employed during the preceding year within this state and upon each dollar of such amount. * * * If the dividends upon the capital stock amount to six, or more than six per centum upon the par value of the capital stock, during any year ending with the thirty-first day of October, the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the par value of the capital stock during said year.”

Section 183 specifically sets forth the corporations exempt from the tax provided by section 182 and provides that a corporation “ liable to a tax under section 185 and 186 of this chapter, shall be exempt from the payment of the taxes prescribed by section 182 of this chapter.”

Section 184, entitled “ Additional franchise tax

on transportation and transmission corporations and associations," provides:

"Every corporation * * * formed for steam surface railroad * * * purposes and every other transportation corporation not liable to tax under sections one hundred and eighty-five and one hundred and eighty-six of this chapter shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, an annual excise tax or license fee which shall be equal to five-tenths of one per cent upon its gross earnings within this state
* * *."

Section 185, as we have seen, provides a corporate franchise tax on elevated railroads or surface railroads not operated by steam, of one per centum on their gross earnings and, where the amount of dividends declared is in excess of four per cent, a tax of three per cent.

A cursory history of the sources of the above sections will help to their understanding. Corporate franchise taxation was inaugurated in this State by chapter 542 of the Laws of 1880 (amended by chapter 361 of the Laws of 1881). By section 3 of that act all corporations, with certain exceptions, were subject to a corporate franchise tax, based on capital stock. By section 6 of the act every corporation "formed for railroad * * * or transportation purposes and every elevated railroad" was required to pay a tax of five-tenths of one per cent upon its gross earnings in addition to the tax imposed by section 3. So, that from 1881 down to 1896, all railroads, whether steam, elevated or street surface railroads, were taxed under sections 3 and 6 of

chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881. In 1896 the Tax Law was revised as follows: Section 3 of the act of 1880 became the present section 182; the exceptions contained in section 3 became section 183; section 6 became section 184; and an entirely new section, section 185, was added, providing for the corporate franchise taxation of elevated railroads or surface railroads not operated by steam.

The Court of Appeals held in 200 N. Y. 93 that although the relator was properly taxed under section 185, on account of its elevated railroad operations, yet that it was not properly taxed under such section on account of its subway operations. The plaintiff in error makes the claim that it is not taxable on account of its subway operations under sections 182 and 184, because sections 183 and 184 exempt from taxation under sections 182 and 184 corporations taxable under section 185. No such literal construction can be given to the provisions of sections 183 and 184 in view of the grounds on which this court's opinion rested in 200 N. Y. 93. In its opinion this court conceded that the Comptroller's tax on the relator under section 185 was justified by a literal interpretation of the provisions of such section. Judge Hiscock says in his opinion:

“ This contention and decision (Comptroller's) has been based on a literal interpretation of the statute (section 185) that every corporation operating an elevated railroad shall pay for the privilege of exercising its corporate franchise, an annual tax which will be one per centum of its gross earnings ‘ from all sources within this state.’ etc., and,

of course, such literal interpretations would support the conclusion which has been reached. We do not think, however, that such interpretation is justifiable under the circumstances of this case."

If, therefore, the relator is to receive a reasonable and equitable interpretation of the literal provisions of section 185 then, reciprocally, must the literal provisions of sections 183 and 184 receive the same reasonable and equitable interpretation. If the same construction is not given to the provisions of sections 183 and 184 then the comprehensive scheme of taxation provided in article 11 of the Tax Law is destroyed. It is clear that every corporation in this State is intended, by article 11 of the Tax Law to be subjected to a corporate franchise tax, except those that are specifically exempted in section 183. Unless the relator is taxable under sections 182 and 184 for the exercise of its corporate franchises, on account of its subway operations, then it is not taxable at all for such exercise of its corporate franchises. If this is so, then the relator is an extraordinary exception to the whole general scheme of corporate franchise taxation in this State. It cannot be that the Court of Appeals in giving a reasonable interpretation to the literal provisions of section 185 (with a saving to the relator of about \$90,000) intended to exempt it from all corporate franchise tax on account of its subway operations, operations in which it is employing its entire capital stock of \$35,000,000. That the Court of Appeals did not so intend is clear from the language of the opinion:

"We now see no reason to doubt that within sections 182 and 184 of the Tax Law

are provisions broad enough to provide for a franchise tax against the relator in respect of its equipment, maintenance and operation of the subway roads."

Even without such express language it would be clear that this court did not intend to exempt relator entirely from corporate franchise taxation on account of its subway operations; for if this court had so intended why the necessity of determining that section 35 of the Rapid Transit Act did not exempt it from corporate franchise taxation on account of such operations. If the relator were not taxable on account of such operations under the provisions of section 185 *and it were not taxable under any of the other sections providing for corporate franchise taxation*, there was no necessity of determining the question of exemption under section 35. This court has held that the relator is not exempt from corporate taxation on account of its subway operations. If it is not exempt, then it must be taxable under sections 182 and 184 which are the only sections applicable to the taxation of its franchise on account of such operations.

II.

**THE CORPORATE FRANCHISE TAXES
IMPOSED UPON PLAINTIFF IN ERROR
FOR THE YEARS IN QUESTION DID NOT
CONSTITUTE A TAKING OF PROPERTY
WITHOUT DUE PROCESS OF LAW, IN
VIOLATION OF THE FOURTEENTH
AMENDMENT.**

Discussion of this proposition would not seem to be necessary, in view of the discussion under Point I of this brief in regard to the proposition that such taxation was an impairment of obligation, under the United States Constitution. If it was not an impairment of obligation, then it must inevitably follow that it does not constitute the taking of property without due process of law.

III.

**THE JUDGMENT SHOULD BE AF-
FIRMED, WITH COSTS AND DISBURSE-
MENTS.**

Dated, January 19, 1915.

EGBURT E. WOODBURY,

Attorney-General of the State of New York.

FRANKLIN KENNEDY,

Deputy Attorney-General,

Of Counsel.

SCHEDULE A.

Chapter 542 of the Laws of 1880, entitled "An act to provide for raising taxes for the use of the State upon certain corporations, joint-stock companies and associations."

" § 3. Every corporation, joint-stock company or association whatever, now or hereafter incorporated under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, except savings banks, and institutions for savings, life insurance companies, banks and foreign insurance companies, and manufacturing corporations carrying on manufacture within this State, shall be subject to and pay a tax into the treasury of the State annually, to be computed as follows: If the dividend or dividends, made or declared by such corporation, joint-stock company or association, during any year ending with the first Monday in November amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per centum of dividend so made or declared, or if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of one and one-half mills upon each dollar of a valuation of the said capital stock made in accordance with the provisions of the first section of this act; and in case any such corporation, joint-stock company or association shall have more than one kind of capital stock, as for instance, common and preferred stock, and upon one of said stocks a dividend or divi-

dends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared or the dividend or dividends thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto, tax shall be charged at the rate of one and one-half mills upon each dollar of a valuation, made also in accordance with the provisions of the first section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum."

" § 6. In addition to the taxes above provided for, every corporation formed for railroad, canal, steamboat, ferry, express, navigation or transportation purposes, and every elevated railway company, and every other corporation, joint-stock company or association now or hereafter incorporated by or under any law of this State, or now or hereafter incorporated by any other State or country and doing business in this State, and owning, operating or leasing to or from another corporation, joint-stock company or association, any railroad, canal, steamboat, ferry, express, navigation, pipe line or transportation route or line, or elevated railway, or other device, for the transportation of freight or passengers, or in any way engaged in the business of transporting freights or passengers, and every telegraph company or telephone company incorporated under the laws of this or any other state, and doing busi-

ness in this State, and every express company, palace car or sleeping car company, incorporated or unincorporated, doing business in this State, shall pay to the State Treasurer for the use of the State a tax of five-tenths of one per centum upon the gross earnings in this State of said corporation or company, for tolls, transportation, telegraph or express business transacted in this State, and in arriving at the gross earnings of any express, palace car or sleeping car company, or freight line, there shall be first deducted the expenses paid to any common carrier for transportation upon such business within this State. Nothing in this section contained shall be held to apply to any street surface railroad company."

These sections are the sections which are important to the questions here involved. The subsequent amendments did not modify or change in any particular the taxing provisions in regard to corporations earning or declaring more than 6 per cent. dividends or in relation to the gross earnings tax contained in section 6. These provisions, as will be observed, were the same in 1894, when section 35 was enacted, and are the same today.



FILED
JAN 18 1915
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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 129.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*
INTERBOROUGH RAPID TRANSIT COMPANY,

Plaintiff in Error,

vs.

WILLIAM SOHMER, as Comptroller of the State of New York,

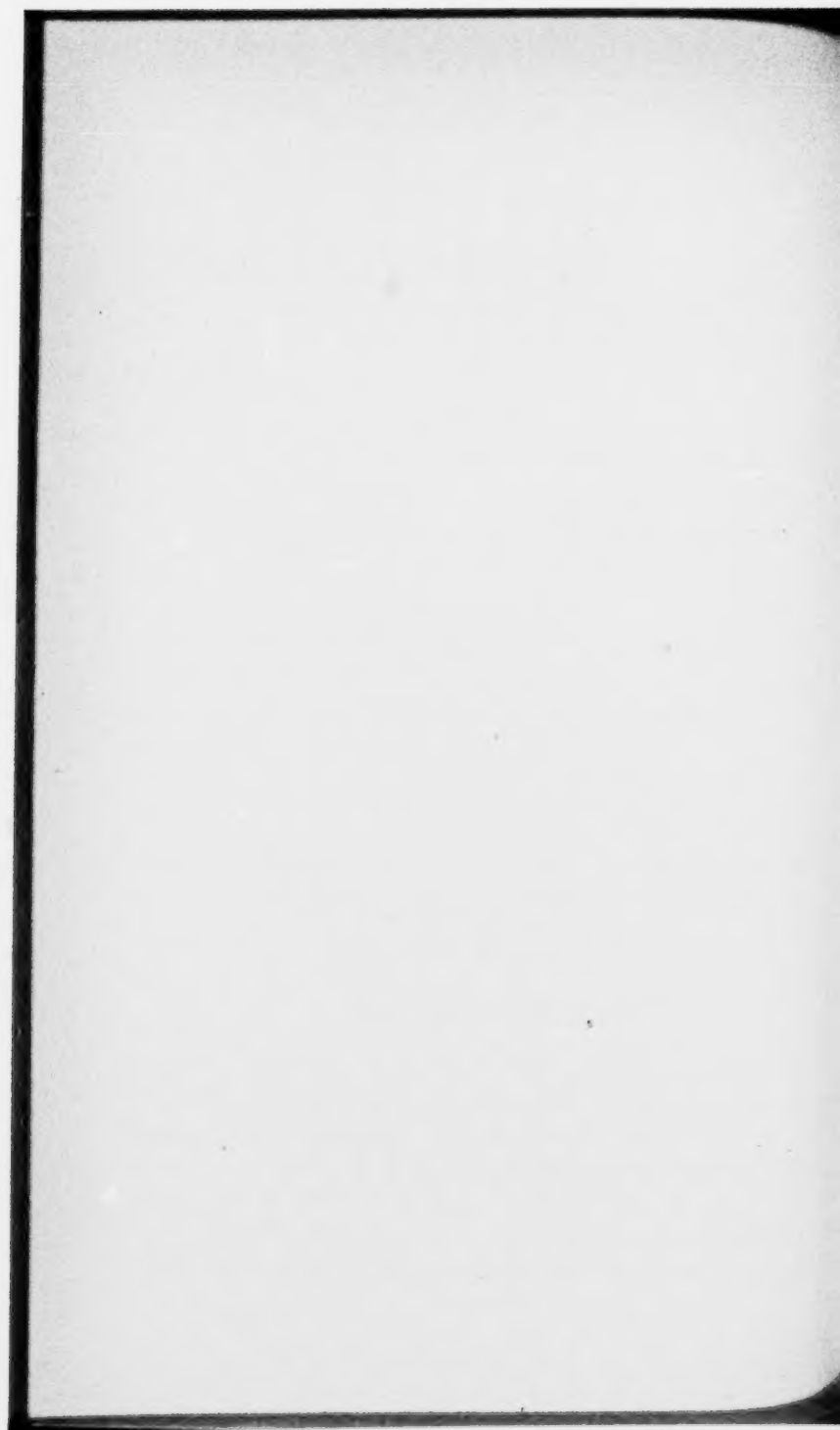
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO DEFENDANT IN ERROR.

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YORK EX REL. INTERBOROUGH
RAPID TRANSIT COMPANY,
Plaintiff in Error,

v.

WILLIAM SOHMER, as Comptroller of
the State of New York,
Defendant in Error.

**BRIEF OF PLAINTIFF IN ERROR IN
REPLY TO DEFENDANT IN ERROR.**

I.

The Applicable Statute.

Defendant in error points out that as the taxes involved are those for the years 1907, 1908, 1909 and 1910, the applicable provisions of the Tax Law would be Laws of 1906, Chapter 474, as amended (Brief, p. 3).

To be exact, so much of the assessment for the years 1907 and 1908 as affects the interest of the plaintiff in error in the Rapid Transit Railways (or Subway), was levied under Sec-

tions 182 and 184 of the Tax Law of 1896, as amended by Chapter 474, Laws of 1906, and Chapter 734, Laws of 1907 (Appendix, pp. 130, 133). The similar assessments for the years 1909 and 1910 were levied under Sections 182 and 184 of the Consolidated Tax Law of 1909 (Appendix, p. 138, *et seq.*).

It is also true, as stated by defendant in error (Brief, p. 2), that the taxes "were assessed by the Comptroller under the provisions of Article IX. of the Tax Law of the State of New York, being Chapter 62 of the Laws of 1909, entitled "An Act in Relation to Taxation, constituting Chapter 60 of the Consolidated Laws." Notwithstanding this statement, quoted from the brief of defendant in error, he makes the extraordinary statement at a later place in his brief that :

" There is no claim, and indeed the specifications of error as stated by the brief of the defendant on page 13 makes no claim that there was "

any exertion of the legislative power of the State with reference to Section 35 of the Rapid Transit Law, containing the exemption from taxation under discussion.

" It is simply claimed there that the construction of the Tax Laws of the State of New York by the Court of Appeals and the assessment of corporate franchise taxes involved under the Tax Law of the State, impaired the obligation of the contract " (Brief, p. 19).

It is submitted that the specifications of error, which are a mere summary of the assignments of error (Rec., pp. 9, 11) bear no such construction, and that the entire argument of the plaintiff in error, specifically that beginning with the last paragraph on page 59 of its brief and running through to page 66, entirely negatives any such assertion.

Defendant in error argues that because since 1880 there have been statutes in New York imposing a franchise tax

on corporations, the enactment of the Tax Law of 1896 and the radical amendments of 1906 and 1907, and the further Consolidation Law of 1909, worked no legislative change in the pre-existing law, and therefore that the laws under which the taxes complained of have been imposed by the State for the years 1907, 1908, 1909 and 1910, laws enacted long subsequent to the exempting acts of 1894, 1896 and 1900, pursuant to which the City of New York contracted with plaintiff in error, do not constitute the making by the State of laws impairing the obligation of a contract. To sustain this argument, defendant in error contends (Brief, p. 21) that Chapter 908 of the Laws of 1896 did not work any change in the previous provisions of the law, "but was simply a revision of the existing law."

II.

The Acts of 1896, 1906, 1907 and 1909 did change the pre-existing law, and do constitute new and subsequent legislation, impairing the obligation of the contract upon which plaintiff in error relies.

While it is true that since 1880 there have been on the statute books of New York provisions imposing a franchise tax upon corporations, it is not true, as contended by the defendant in error in his brief, that "Chapter 908 of the Laws of 1896 did not work any change in these provisions, but was simply a revision of the existing law" (p. 21); nor that the subsequent amendments, passed in 1906 and 1907, and finally embodied in the Consolidated Laws of 1909, effected no substantial change in the Tax Law.

In *Matter of Huntington*, 168 N. Y., 399, 407, the Court expressed the opinion that the legislature intended by the Tax Law of 1896 :

"To cover, as the act constituting the commissioners of statutory revision required, the whole field of 'the collection and assessment of taxes and exemption of property from taxation throughout the State,' so far, at least, as their view of the subject extended."

In *People ex rel. Roosevelt Hospital vs. Raymond*, 194 N. Y., 189, 194, the Court referred to the decision last mentioned, saying :

"We there held that the General Tax Law was such a revision of, and substitution for, all former statutes, general and special, upon the subject of exemption from taxation, as to supersede and repeal them by implication."

In *Peterson vs. Martino*, 210 N. Y., 412, the Court referred to previous decisions as establishing "That the provisions of the general tax law establish 'a complete and harmonious system of taxation and procedure.'" The Court further said of this General Tax Law of 1896 :

"It has been declared to be 'a codifying act, designed to reduce all statutes relating to taxation into a complete and harmonious system' and 'to exhaust the subject to which it relates'. * * * It has, accordingly, been held to override earlier statutes relating to taxation, even though the laws thus displaced were not enumerated in the schedule of one hundred and fifty-three acts and parts of acts expressly repealed."

The amendments of 1906 effected substantial changes in the Act of 1896. *Inter alia*, the tax imposed by Section 282 was made payable in advance. By the Act of 1896 the tax was to be computed upon the basis of the amount of the capital stock of the corporation employed within the State.

The distinction between capital EMPLOYED and capital *invested* was noted in the opinion of the Court in *People ex rel. Vandervoort R. Co. vs. Glynn*, 194 N. Y., 387, 390, and in *People ex rel. Wall & H. St. R. Co. vs. Miller*, 181 N. Y., 328, 335. By the amendment of 1906 (Appendix, p. 130) the measure of the amount of capital stock employed within the State was declared to be "such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets whenever employed in business."

In *People ex rel. Waclark Co. vs. Williams*, 198 N. Y., 54, the Court noted that the Tax Law of 1896

"Did not require that the capital stock of a corporation should be employed in business in order to render it liable to taxation. It was sufficient if the capital stock was employed at all."

Whereas, under the Act of 1906, the capital which is the basis of the tax must be "employed in business." The fact is, that the New York laws relating to taxation of corporations have been radically revised in 1896, 1906, 1907 and 1909.

In *Pratt Institute vs. City of New York*, 183 N. Y., 151, the Court, referring to the revision of 1896, said :

"It is a codifying act, designed to reduce all statutes relating to taxation into a complete and harmonious system. A codifying act is presumed to exhaust the subject to which it relates, unless a different intention appears on the face of the statute, or is an irresistible inference from special circumstances. The new enactment is substituted in place of all statutes previously existing, and becomes the sole rule of action."

The Court quoted with approval from *Sutherland on Statutory Construction* (Lewis' Edition), Sections 269, 270, to the effect (*i. a.*) that a revision will repeal by implication previous statutes on the same subject, although there be no repugnance.

It cited also the opinion of Chief Justice WAITE in *King vs. Cornell*, 106 U. S., 395, that

"While repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show it was intended as a substitute for the first, it will operate as a repeal."

To the same effect :

Tracy vs. Tuffy, 134 U. S., 206, 223.

In the latest text book on the subject of taxation of corporations in New York, revised by a gentleman of unusual experience in that subject, it is said :

"In 1906 and 1907 the method of computing the franchise tax and the license tax under Sections 181 and 182 of the Tax Law was materially changed. While the basis of the tax remained capital stock employed in the State, the value of the capital stock and the rate of the tax were fixed by certain arbitrary rules. Heretofore, the value of the capital stock employed within the State had been in most cases determined by the value of the property itself. *People ex rel. Commercial Cable Co. v. Morgan*, 178 N. Y., 433 (1904). The method of ascertaining the amount of the capital stock employed in the State by means of the property or gross assets in the State is now incorporated in the statute, and very little is left to the discretion of the Comptroller in making an assessment." *Powell's Tax of Corporations*, 2d Ed. (1914), p. 217.

Again he says (p. 245) :

"Under the law, prior to 1906, the Comptroller was not required to ascertain the intrinsic or actual value of the stock in cash, unless such intrinsic value exceeded the market value. *People ex rel. Brooklyn El. R. R. Co. v. Roberts*, 90 Hun, 537 (1895). This was so

even though the assessment made by the Comptroller, based on such average price, was more than the par value of the stock and thus indirectly assessed on surplus, for the dividends over six per cent. may be accumulated in the form of surplus, which, if profits had been declared, would have increased the assessment. *People ex rel. Colonial Trust Co. v. Morgan*, 47 App. Div., 126 (1900). Under the present statute, if the dividends are six per cent. or more, the intrinsic value need not be ascertained, and no appraisal is necessary under Section 193 (formerly Sec. 190) of the Tax Law."

III.

There can be no serious dispute that the contract between the City of New York and the plaintiff in error, made under express legislative sanction, confers on the latter some exemption from taxation. The only question is as to the extent of that exemption.

Defendant in error (in his brief, pp. 23 *et seq.*) contends that Section 35 of the Rapid Transit Law does not constitute a contract. He makes no reference in his argument to the contract between the City of New York and plaintiff in error under the authority of the Rapid Transit legislation of 1894 and 1896, in faith of which plaintiff has invested thirty-five million dollars. But the previous decisions of the Court of Appeals are conclusive against him on this proposition.

See:

People ex rel. Interborough Rapid Transit Co. vs. Tax Commissioners, 126 A. D., 610; *aff'd* 195 N. Y., 618.

People ex rel. Interborough Rapid Transit Co. vs. O'Donnell, 202 N. Y., 213, 321.

(See opinion quoted on principal brief, p. 49.)

Defendant in error also falls into error in stating in his brief (p. 26) that in the proceeding to review the original assessment in this case, the question "was squarely up for determination upon the contention of the plaintiff in error that it was exempt from corporate franchise taxation, and the Court squarely determined that it was not." The only question "squarely determined" on that original appeal to the Court of Appeals (reported 200 N. Y., 92 ; Rec., p. 86) was whether or not under Section 185 of the Tax Law plaintiff in error, because it was engaged in operating the elevated railroad lines under lease from the Manhattan Company, was taxable for the privilege of exercising its corporate franchise or carrying on its business in its corporate or organized capacity within the State, upon its gross earnings *from all sources*, including the rapid transit railroad, and upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of its paid up capital employed by it in such rapid transit railroad. The opinion of the Court did contain a *dictum* expressing views regarding the effect of the exemption clause in Section 35 of the Rapid Transit Act, in the following language :

" We do not believe that this provision is broad enough to sustain relator's claim and exempt it from the payment of any franchise tax in its Subway operations " (Rec., p. 82).

In the closing paragraph of its opinion, the Court, however, said :

" The views which have thus been expressed do not in our judgment lead to the final conclusion that the relator, although not assessable in respect to its Subway roads under Section 185 of the Tax Law, does not come within any of the provisions of the law relating to the assessment of a franchise tax. While that specific question has not been fully discussed on this ap-

peal, and therefore perhaps should be regarded as subject to further consideration if necessary, we now see no reason to doubt that within Sections 182 and 184 of the Tax Law are provisions broad enough to provide for a franchise tax against the relator in respect of its equipment, maintenance and operation of the Subway roads " (Rec., p. 86).

Defendant in error under his Point 1, paragraph (d), page 28, *et seq.*, of his brief, seems to misapprehend the position of the plaintiff in error. We do not contend that the plaintiff in error, as a corporation, is exempt from all franchise tax. What is contended is that so long as plaintiff in error is engaged in operating the rapid transit railroad under contract with the City of New York, it cannot be taxed with respect to its interest under that contract, or in respect to the rolling stock and other equipment of the road, whether such tax is called a " franchise " tax or by any other name. It submits that, properly construed, the legislation under which the assessment approved by the Court of Appeals was laid does not justify such tax, but that, if it does, then the law which authorizes it directly impairs the obligation of the contract made between plaintiff in error and the City of New York under the direct authority of the State. In this connection it may be pertinent to point out that the views expressed by Chief Judge CULLEN in the case cited by defendant in error (p. 29), *People ex rel. Cornell Steamboat Co. vs. Sohmer*, to the effect that the franchise tax imposed by Section 182 of the Tax Law of 1896 is a tax " exclusively for the privilege of being a corporation instead of a partnership," was concurred in by only *two* of the Judges of the court, whereas *four* others agreed to affirm the order under review, without concurring in Judge CULLEN's opinion. Judge CULLEN's opinion was, as he states, a reaffirmance of views he had expressed in his dissenting opinion in the case of *New York Terminal Co. vs. Gauss* (204 N. Y., 512, 519), and

those views are at variance with the opinions of the Court expressing its decisions in

People ex rel. Singer Mfg. Co. vs. Wemple, 150 N. Y., 46.

People ex rel. Niagara Co. vs. Roberts, 157 N. Y., 676.

These decisions negative the position taken by defendant in error that the tax is imposed "upon the privilege of being a corporate entity, for the privilege of exercising corporate franchises" (Brief, p. 31).

Nor is the distinction he seeks to make in the construction of the Act of 1906 (Brief, p. 33) that the words "for the privilege of doing business" refers only to *foreign* corporations, and the words "for the privilege of doing business" to domestic corporations, sustained either by the context of the act, or by judicial exposition.

Indeed, in the very case he cites in support of this proposition, *People ex rel. American Contracting & Dredging Co. vs. Wemple*, 129 N. Y., 558, the Court, at pages 562-3, said:

"The relator, being a domestic corporation, was liable to pay a tax upon its franchise and business, to be measured by the amount of its capital stock found to be employed in this State."

By the Law of 1896 (Appendix, p. 124) the tax upon foreign and domestic corporations alike was computed "upon the basis of the amount of its capital stock employed within this State." By the Law of 1909, the measure of the amount of capital stock of either domestic or foreign corporations employed in the State, was declared to be "such a portion of the issued capital stock as the gross assets employed in *any business* within this State bear to the gross assets wherever *employed in business*" (Appendix, p. 138).

While it is quite true, as a general proposition, as con-

tended by defendant in error on page 42, that a tax on the corporate franchises may be measured by property exempt from taxation, yet we submit it is not true that it may be measured by capital invested in something "with respect to which" the legislature has declared no tax shall be imposed.

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